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The Role of New Federalism and Public Health Law

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THE ROLE OF NEW FEDERALISM AND PUBLIC HEALTH LAW[1]

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I. INTRODUCTION

There is perhaps no facet of governmental regulation more important to the public welfare than the maintenance of public health.[3] The role of law is vital to the accomplishment of public health objectives. The field of *public health* owes its existence in large part to the role of government and the laws it enacts to control the factors which contribute to a healthier society.[4] As a result, the field of *public health law* is coextensive with the dynamic field of public health: the goals of the latter necessarily become, at least in part, the objectives of the former. These observations are demonstrated through the mirrored development of the American concept of public health goals and the laws enacted to further them.

American public health law is as old as the formation of the colonies themselves. It owes its early origins to the need of colonial governments to protect the public health for the literal survival of the community. Public health laws of sovereign colonial governments were primarily limited to controlling the contagion and spread of communicable diseases. Law provided for the quarantine of diseased individuals, the vaccination of others, and, to a lesser degree, the improvement of societal conditions which led to the spread of disease. Public health law then was as much a necessary practice as it was a governmental responsibility.[5] Its foundation lay upon citizens of colonial governments who depended on the absolutism of its practice.

From the original colonies there formed a nation with a political and legal system unlike any other.[6] As a compromise between competing political

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[3] *See* Lawrence O. Gostin, *Symposium: Securing Health or Just Health Care? The Effect of the Health Care System on the Health of America*, 39 ST. LOUIS U. L. J. 7, 12 (1994) ("the prevention of disease or disability and the promotion of health, within reasonable resource constraints, provides the preeminent justification for the government to act for the welfare of society").

[4] *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (the protection and preservation of the public health is among the most important duties of state government).

[5] Wendy Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 281 (1993) [hereinafter Parmet, *Health Care and the Constitution*] ("Government is, in fact, organized for the express purpose, among others, of conserving the public health and can not divest itself of this important duty," *citing* James A. Tobey, *Public Health and the Police Power*, 4 N.Y.U. L. REV. 126 (1927)).

[6] "[F]ederalism was the unique contribution of the Framers to political science and theory." United States v. Lopez, 541 U.S. 549, 575 (Kennedy, C.O.). "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty." U.S. Term Limits,

ideologies, the Constitution created a union among states with broad sovereign powers into a national government of enumerated, although supreme, powers. From this compromise, federalism as a principle of law and legal design was born. As a principle of law, federalism distinguishes between the limited (although supreme) powers of the federal government and the broad sovereign powers left to the states via the Tenth Amendment. As a principle of legal design, it requires the division of governmental powers for the mutual preservation of national and state governments, and impliedly creates an enforceable barrier between the exercises of such authority. In theory, neither state nor federal governments may impede the respective powers of the other.

Among the states' retained powers under the Constitution, collectively known as the police powers, is the original sovereign power used during the colonial era to protect the public health. Yet, with the ratification of the Constitution, public health law changed.

The validity of public health laws and regulations at the state (or federal) level depended on two primary constitutional questions: (1) does the governmental entity have the constitutional power to act in the interest of public health?; and, if so, (2) does the specific manner in which it has acted violate or exceed any constitutional principles or individuals rights?

The answer to the first of these questions depends on the role federalism plays in our legal system. While federalism owes its existence to the original Framers, it's judicial interpretation is largely left to the courts which have greatly contributed to shaping its scope. Under the initial conception of the federalist framework of government, states and their local subsidiaries had virtually exclusive responsibility for regulating and controlling matters related to public health. In blind deference to legislative decisionmaking, courts rarely struck down state public health regulations. Exercises of state police powers in the interests of public health were considered preeminent to the individual constitutional rights of those affected.[7]

Over decades, federal judicial and legislative intervention in matters of public health became more pronounced. State exercises of police powers in the field of public health law were limited in federal cases like *Jacobson v. Massachusetts*[8] which constitutionally conditioned the means of enforcement of public health laws to matters having real or substantial relation to the

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Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). "As a matter of political theory, th[e] federal arrangement of due delegated sovereign powers truly was a more revolutionary turn than the late war had been." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 150 (1996) (Souter, J., concurring).

[7] *See, e.g.*, Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240, 2245 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically, . . . matter[s] of local concern' [citation omitted], the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons' [citation omitted]").

[8] 197 U.S. 11 (1905).

protection of public health. Federal control over public health matters significantly increased as a result of the Court's broadened interpretations of Congress' Commerce powers and Tax and Spend powers during the New Deal era. National interests justified the expansion of federal powers into areas of traditional state concern. Executive agencies at the national level were formed pursuant to Congressional legislation with the specific and secondary purposes of improving public health. States' legal objections based in part on principles of federalism were ignored or brushed aside. Federalism, it was said, "is dead."[9]

The predicted "death" of federalism has resulted in a more nationalized system of public health regulation given the increased role of the federal government in the field. With federal powers at their disposal, public health officials envisioned the accomplishment of new, national objectives. Original public health objectives, once limited to controlling contagious diseases, broadened to include the assurance of conditions for people to be healthy. Public health law subsequently expanded to include those laws and regulations passed, enforced, and adjudicated at the national, state, and local level which in some manner regulated the conditions that affect the public health.

An important observation of these developments is the degree to which public health law objectives have changed in sync with the Court's interpretations of the role of federalism in controlling governmental power. A corollary to this observation is that each conception of public health objectives, whether local or national, relies to an extent on the particular governmental structure supported by federalism interpretations. State exercises of police powers in the interests of public health depend on non-interference of the national government in a decentralized, state-based framework. A national conception of public health law seemingly relies on the broad exercise of federal powers in a centralized, national government. Under either conception, the stability of federalism is important because its interpretation by the Court influences the particular governmental framework upon which the conception relies.

The stability of federalism in the field of public health is especially intriguing because federalism is re-emerging as a major source of constitutional adjudication. Though set aside during the New Deal, the Court has recently laid a new foundation of federalism-based cases. Notable decisions since 1991 have reinforced the original federalism principle of federal non-interference in areas of traditional state powers, often by emphasizing the importance of the political process. The collective diversity of the Court's recent jurisprudence is testament to the revived strength of federalism. Among these cases are the Court's decisions in *New York v. United States*,[10] confining Congress' authority

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[9]Joseph Lesser, THE COURSE OF FEDERALISM IN AMERICA - AN HISTORICAL OVERVIEW, IN FEDERALISM: THE SHIFTING BALANCE 11 (Janice C. Griffith, ed. 1987) [hereinafter Lesser, THE COURSE OF FEDERALISM].

[10]505 U.S. 144 (1992).

to "commandeer" states in the regulation of the disposal of radioactive wastes, and *United States v. Lopez*,[11] denying Congress the Commerce power to make criminal the mere possession of handguns in school zones, both legitimate public health concerns. Through these and other cases, the Court has again recognized federalism as more than a principle of legal design: it is a substantive constitutional argument.

In an era of national public health objectives, what has been coined *new federalism* cannot be ignored. It reminds us of the historical veracity of state government responsibility to regulate in the interests of public health pursuant to their police powers. It advises us that simple reliance on the passage of federal law to accomplish national public health objectives is illusory. Ultimately, *new federalism* tells us that the means through which we pursue our national public health agenda must comport with the federalist system of government through which our nation exists. Without abandoning the laudable national objectives of public health, the offshoot of *new federalism* requires us to look for sources of law other than federal legislation to accomplish public health ends.

To understand the impact of *new federalism* on the field of public health law, I explore the development of the interrelated concepts of federalism, state police powers, and public health over time. This article concentrates on the theoretical and legal meanings of these concepts in American jurisprudence.[12] Part II further defines the concept of federalism and its relation to the field of public health law. Part III thoroughly examines the traditional nature of the states' police powers as sources of state authority for public health laws and the corresponding localization of public health goals. The rise of the federal role in regulating public health and the nationalization of public health objectives is discussed in Part IV. Part V synthesizes the *new federalism* decisions of the Supreme Court into a discussion of the present and future impact of *new federalism* in the field of public health law. A brief conclusion follows.

II. FEDERALISM AND ITS RELATION TO PUBLIC HEALTH LAW

It has been said that in the context of public health, the Constitution "acts as both a fountain and a levee."[13] It "controls the flow of governmental power between state and federal governments to preserve the public health, and subsequently curbs that power to protect individual freedoms."[14] If the Consti-

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[11] 514 U.S. 544 (1995).

[12] Further exploration, which remains a future topic for discussion, centers on the particular legislative responses and strategies in relation to these findings.

[13] JUDITH AREEN ET AL., LAW, SCIENCE AND MEDICINE 520 (2d ed. 1996). The quote is attributed to Professor Lawrence O. Gostin, one of the five authors of the above-referenced text and author of Chapter 5, Public Health Law.

[14] *Id.*

tution is a fountain from which powers flow to the states,[15] the principle of federalism represents the partition in the pool from which the states' fountain draws. Federalism divides and balances the available pool of legislative power into two segments of government, national and state.[16] As one institutional author describes it, "federalism is a constitutionally based, structural theory of government designed to ensure political freedom. . . ."[17] It is as much a principle of law as it is a principle of governmental design: federalism represents the fundamental framework of American government.[18]

Federalism emerged from the Constitutional Convention as "the product of compromise."[19] A minority of the colonies' delegates to the Convention, known as the federalists, advocated the creation of a federal government representing little more than a loose "compact resting on the good faith of the parties."[20] Nationalists strongly argued for the formation of a national government which would become a central governing authority over the new states. The Constitution had to satisfy both sides. As nationalist James Madison would later state: "The proposed Constitution . . . is in strictness, neither a national nor a federal Constitution, but a combination of both."[21] Initial concerns of the federalists about the strength of the national government created by the Constitution led to the nationalists' assurance that a bill of rights, including a provision explicitly reserving to the states their inherent vast sovereign powers, would be considered by the First Congress.[22]

In practice federalism distinguishes between the powers among the levels of American governments. The federal government has those limited powers granted pursuant to the Constitution, including the power to enact laws in areas which the federal government has jurisdiction. The remaining sovereign

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[15]It is uncertain that the constitutional Framers or Supreme Court conceived the Constitution as a source of power to the states since the states simply retained their powers not otherwise delegated to the federal Congress nor prohibited by the Constitution. *See* Gibbons v. Ogden, 22 U.S. 1, 87 (1824) ("[T]he constitution gives nothing to the States or the people. Their rights existed before it was formed; and are derived from the nature of sovereignty and the principles of freedom").

[16]*See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[17]A REPORT OF THE WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL, THE STATUS OF FEDERALISM IN AMERICA 5 (1986) [hereinafter REPORT WORKING GROUP].

[18]*See* Texas v. White, 74 U.S. 700, 725 (1869) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States").

[19]REPORT WORKING GROUP *supra* note 17, at 7.

[20]*Id. citing* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 121 (C.C. Tansill, ed. 1927).

[21]*Id.* at 8, *citing* The Federalist Papers, No. 39, at 246.

[22]*Id.* at 9-10. On December 15, 1971, the Tenth Amendment of the Bill of Rights was ratified, thus explicitly reserving to the states or the people all powers other than those delegated to the United States Congress or prohibited by the Constitution.

powers of government are reserved to the states via the Tenth Amendment. As further explained in Part III, these powers, collectively known as police powers, give states broad jurisdiction to regulate matters affecting the health, safety, and general welfare of the public, including matters which affect the public health.

To preserve the powers of the federal government from intrusion by the states, the Supremacy Clause[23] provides that federal laws and regulations override conflicting state laws under the doctrine of preemption. State law is deemed preempted by federal constitutional or statutory law either by express provision,[24] by a conflict between federal and state law,[25] or by implication where "Congress so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"[26] Likewise, with the passage of the Tenth Amendment, states retained their dominant place in American government by reserving sovereign power over "all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[27]

The modern question of new federalism is the point in which federal intrusion into predominantly state matters exceeds the limits of federal powers. Originally, federal exercises which interfered with traditional state powers were virtually inconceivable in light of the considerable weight of state police powers.[28] As Alexander Hamilton observed during the drafting of the Constitution, it does not follow: "that acts of the [national government] which are not pursuant to its constitutional powers, but which are invasions of the

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[23]U.S. CONST. art. VI, par. 2 ("[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . ").

[24]*See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[25]*See* Maryland v. Louisiana, 451 U.S. 725 (1981); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645, 654 (1995).

[26]Fidelity Federal Savings and Loan Assn. v. De la Cuesta, 458 U.S. 141 (1982) *quoting* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Jones v. Rath Packing Co., 430 U.S. 519, 527 (1977).

[27]James Madison, The Federalist Papers, No. 45, at 292-93 (C. Rossiter ed. 1961), cited in Gregory v. Ashcroft, 501 U.S. 452 (1991).

[28]States were considered essential to the functioning of government because they retained the majority of powers. REPORT WORKING, *supra* note 17, at 10. So powerful were the states under the original balance of power among the national and state governments that Alexander Hamilton commented "there is greater probability of encroachments by the [states] upon the federal [government] than by the federal [government] upon the [states]. *Id.* at 9, *citing* The Federalist Papers, No. 31, at 197. *See also* New York v. United States, 505 U.S. 144, 154 (1992) ("The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities").

residuary authorities of the [States] will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such."[29] In theory, federal legislation which touched areas traditionally left to the states was beyond Congress' jurisdiction, and therefore did not reign supreme over state law.

While the distinction between federal and state powers is a consequence of the principle of federalism, it is not always predictable in application. "The meaning of federalism, after all, has been the primary political issue for most of American history,"[30] even though the distribution of powers among governments was originally meant to be relatively clear.[31] Federalism represents neither a bright line nor visible boundary between state and federal powers.[32] Although the principle exists upon the Framers' precepts of the value of separating the functions of the two levels of government to avoid unnecessary collisions between them, the powers of federal and state governments approach one another on a regular basis, the field of public health law being no exception. It is precisely at the point when federal and state powers collide that federalism takes on many shades in "almost imperceptible gradations."[33]

The modern field of public health law involves such a collision between federal and state governmental powers. Yet, what is *public health law*? Is it merely comprised of those laws and regulations passed at the federal, state, and local levels in the direct interest of the health of the public? Or is it encompassed by the totality of all laws passed at any level of government which in some way have an affect on the public's health? Or is it something in between? These questions depend on the definition of *public health.* Like federalism, the field of public health is broad and flexible in its scope. It is modernly defined as comprising "the regulation of conditions that affect [public] health."[34] Or, as the Institute of Medicine proposes, "[p]ublic health is what we, as a society, do collectively to assure the conditions for people to be

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[29] REPORT WORKING, *supra* note 17, at 37, *citing* The Federalist Papers, No. 33, at 204.

[30] R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 GEO. L. J. 91, 120 (1995).

[31] The essence of federalism is that federal and state governments "should be limited to [their] own sphere and, within that sphere, should be independent of the other." RUTH LOCKE ROETTINGER, THE SUPREME COURT AND STATE POLICE POWER: A STUDY IN FEDERALISM 5 (1957) [hereinafter ROETTINGER, THE SUPREME COURT], *citing* K.C. WHEARE, FEDERAL GOVERNMENT (1951). *See also* Younger v. Harris, 401 U.S. 37, 44 (1971) ("[Federalism involves] a proper respect for state functions, . . . and . . . the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways").

[32] *See* New York v. United States, 505 U.S. 144, 153 (1992) ("the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases").

[33] 16 AM. JUR.2D *Constitutional Law* § 277 (1979).

[34] FRANK P. GRAD, THE PUBLIC HEALTH LAW MANUAL 4 (2d ed. 1990).

healthy."[35] Though broad and to some extent vague, the aforementioned definitions also seem quite accurate. For to understand and appreciate the enormous task of maintaining and preserving the public health, it must be conceded that all conditions which directly or indirectly affect the health of the public be considered.

The law is a vital link to accomplishing public health objectives.[36] The expansion and development of the field of public health from its modest, early attempts to control contagious diseases to the varied regulations of conditions affecting health have greatly relied on law.[37] "Law is essential to public health because public health programs are entirely dependent on *legislative* authorization."[38] The law is a primary vehicle through which public behaviors detrimental to its collective health can effectively be dissuaded, curbed, and, in some cases, prohibited. Converely, the law protects individuals from invidious public health measures. In essence, modern public health law is comprised of those laws and regulations passed, enforced, and adjudicated at the federal, state, and local levels of government which in some manner regulate the conditions that affect the public health.[39]

Which level of government has the responsibility for passing, enforcing, and adjudicating which public health laws? The answer is not an ultimatum. Obviously federal and state governments can share jurisdictional power in certain fields. Governmental power in any field is limited though. Because of

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[35] INSTITUTE OF MEDICINE, THE FUTURE OF PUBLIC HEALTH 19 (1988) [hereinafter INSTITUTE].

[36] This broad conception of public health as comprising the regulation of conditions which affect health does not necessarily mean the law is the sole instrument through which the goals of public health are accomplished. Government is not the only entity which impacts the field. Private actors can play a tremendous role in controlling public health. *See* Lawrence O. Gostin, *Public Health Law: A Review*, 2 CURRENT ISSUES IN PUBLIC HEALTH 205-214 (1996).

[37] GRAD, *supra* note 34, at 9.

[38] *Id.* (emphasis original).

[39] In this sense, public health law is not limited merely to legislation (although the bulk of this Article's discussion is limited to legislative authorization), but may also include administrative regulations, executive policies, common law, and other sources of governmental authority having the force and effect of law.

Compare GOSTIN, *supra* note 36. Professor Gostin defines public health law as:

> The study of the legal powers and duties of organized society to assure the conditions for people to be healthy (e.g., to identify, quantify, prevent, and ameliorate risks to health in the population), and the limitations on the power of organized society to constrain the autonomy, privacy, liberty, property, or other legally protected interests of individuals for the purposes of protection or promotion of community health.

While Professor Gostin's informed definition accurately describes the field of public health law as a discipline, my proffered definition for the purposes of this Article concentrates on the expression of governmental authority through legislation in furtherance of improving the conditions that affect the public health.

the intersection of federal and state powers in the field of public health, legal struggles over the exercise of limited powers occur. The resolution of such disputes is uniquely within the province of federalism. States' traditional abilities to control and maintain public health remains contingent on the scope of their police powers and the extent of federal intrusion. Likewise, the scope of states' police powers is contingent on the treatment states receive in the exercise of these powers by the courts. This in turn depends on the emphasis courts place on the principle of federalism.[40] When federalism concerns are more strongly emphasized, states have more ability to regulate matters of public health pursuant to their police powers. When federalism principles are weakened or ignored, states lose out to federal interventions over such traditional exercises.

Thus, federalism preserves the police powers of the states and acts as a barrier to federal legislative intervention in matters within the scope of those powers.[41] It simultaneously restricts the federal government's ability to regulate in the interests of public health since such regulation has traditionally been the responsibility of state governments. Hanging in the balance of these observations are the very goals of public health which rely on the role federalism plays.

III. STATE POLICE POWERS UNDER THE TENTH AMENDMENT

The integral component of federalism is the division of powers among the national and state governments. Consistent with this component, states are reserved those powers not delegated to the federal government nor prohibited to them by the Constitution. This Part examines the theoretical, historical, and legal underpinnings of the reserved powers of states via the Tenth Amendment[42] and their application to public health law.

A. Defining Police Powers

As James Madison stated in *The Federalist* series:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of

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[40] *See* Ronald J. Bacigal, *The Federalism Pendulum*, 98 W. VA. L. REV. 771, 772 (1996) ("Federalism [identifies] the rules of the game under which the process of decision-making and exercise of government power will proceed").

[41] *See, e.g.*, Daniel M. Kolkey, *The Constitutional Cycles of Federalism*, 32 IDAHO L. REV. 495, 502 (1996) ("Federalism can thus be a way of providing a restraint on the expansion of federal power").

[42] The Tenth Amendment to the U.S. Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

> the people, and the internal order, improvement, and prosperity of the State.[43]

To this end, states maintain control over those matters which are reasonably related to the promotion and maintenance of the health, safety, morals, and general welfare of the public,[44] through what are traditionally known as "police powers."

While police powers represent the residual authority of states under the Constitution, as a concept it defies singular definition.[45] Although "generally understood and universally recognized,"[46] the composition of police powers is rather ambiguous.[47]

In a general sense, "[police power] means the power to regulate the conduct and relations of members of society."[48] Police powers in American jurisprudence denote the power of state governments to promote the public welfare by restraining and regulating private individuals' rights to liberty and uses of property.[49]

This legal conception of police powers is hardly precise. The Supreme Court has acknowledged that the states' police powers concept are "neither abstractly nor historically capable of complete definition,"[50] but rather, the product of legislative determinations.[51] State police powers are not so much a thing which can be defined as they are a legal concept in constant evolution. A theoretical and historical glimpse of the concept demonstrates the difficulties which American courts, legal theorists, and the general public have shared in defining and conceptualizing police powers. As well, a review of the legal development of police powers, with a focus on its relation to public health, provides insight to its ever-changing role in American government and the field of public health law.

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[43]James Madison, The Federalist No. 45, 292-93 (C. Rossiter ed. 1961), cited in Gregory v. Ashcroft, 501 U.S. 452 (1991).

[44]BARRON'S LAW DICTIONARY 350 (2d ed. 1984).

[45]16A AM. JUR.2D *Constitutional Law* § 362-363 (1979).

[46]*Id.* at § 315.

[47]Perhaps some of the confusion on the meaning of police powers stems from the misleading choice of the term itself. "This phrase is probably an unfortunate one as far as the man in the street is concerned since he tends to confuse it with the power of the policeman of the street corner." ROETTINGER, THE SUPREME COURT *supra* note 31, at 10. Yet, the residual powers of the states entail much more than the enforcement of criminal laws.

[48]*Id. citing* JUSTICE OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION (1951).

[49]*See, e.g.*, ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 3-4 (1904).

[50]Berman v. Parker, 348 U.S. 26, 31 (1954).

[51]*Id.*

B. Theoretical Analysis of Police Powers

Police powers are so intricately tied to the functions of sovereign governments as to date back to their very formation. They originate in the inherent need of government to impose certain restraints on the private actions of citizens for the benefit of all.[52] As people organized themselves into meaningful societies, they realized that certain conditions must be placed on the freedoms of individuals for society to be productive and beneficial.[53] Laws were imposed to eliminate or reduce the negative transgressions of private actions on the private rights or property of others.[54]

As one author theorizes, "police powers have their origin in the law of necessity."[55] Police powers are "a necessary attribute of every civilized government."[56] Where individual actions or other elements constitute threats to the public welfare, governments should be able to use their powers to reduce, deter, or enjoin the resulting harms to society.[57] In order for individuals to exist peacefully and beneficially in societal groups, governments must be able to control individual rights and uses of property in the interests of increasing the benefits and reducing societal drawbacks. Sovereign police powers represent as much a grant of power to governments from the people as they do an inherent attribute of governmental power over the people.[58] "[T]he public

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[52]*See, e.g.*, CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 1-2 (1886).

[53]For purposes of illustration, take for example the case of the burning campfire. In society where persons began to assemble closely together, one man's desire to keep his campfire burning close to his abode serves his sole purpose of keeping warm. Yet the same campfire offers little benefit to the neighboring person downwind whose dwelling burns down when ignited by sparks from the man's flame. In this scenario, one man's actions (burning a campfire) transgress his personal enjoyment (of the warmth of a campfire) to the unnecessary detriment of another (the burning down of one's abode). Societal restraints upon the actions of individuals (disallowing campfires likely to cause the destruction of another's abode) were created to eliminate the abuses of individual actions for the benefit of all.

[54]It has been noted that the police power rests on the latin maxim "*sic utere tuo ut alienum non laedas*" (so use your own that you do not injure that of another). Police powers, it is said, is the function of government by which this maxim is enforced. *See, e.g.*, 16A AM. JUR.2D *Const. Law* § 368 (1979).

[55]W.P. PRENTICE, POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY 4 (1894) (the author suggests that police powers are synonymous with the "law of overruling necessity").

[56]16A AM. JUR.2D *Const. Law* § 360 (1979).

[57]In this vein, the police powers of government have the same function in society that the powers of self-defense have for individuals. 16A AM. JUR.2D *Const. Law* § 370 (1979) [citation omitted]. *See also* Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905) (Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members).

[58]Shades of the social contract theories of John Locke and other philosophers pervade this conceptualization of police powers, *see* Parmet, *Health Care and the Constitution*, 20

welfare demands that the rights of the individual give way to those of the people as a whole."[59]

C. *American Police Powers*

Since the original thirteen colonies existed as sovereign governments before the formation of the United States, legal theory supports that the Constitutional drafters pre- supposed the existence of the police power of the colonies.[60] The Constitution has been historically construed with reference to the preservation of the state's police powers as an integral presumption.[61] This presumption took form in the language of the Tenth Amendment which the Supreme Court has interpreted to reserve police powers to the states:[62] "[T]*he constitution gives nothing to the States or the people.* Their rights existed before it was formed; and are derived from the nature of sovereignty and the principles of freedom."[63] Thus, the Constitution provides no affirmative grant of power to the states; it merely reserves to the states those powers they already had.

Legal theory also supports the intention of the Constitutional drafters that the reservation of police powers to the states was exclusive, depriving the federal government of any national police powers. As the Supreme Court has explained, the Tenth Amendment: "disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise power which it had not been granted... the framers intended that no such assumption should ever find justification [in the Constitution]."[64]

The term "police powers" first appeared in the landmark decision of the United States Supreme Court, *Gibbons v. Ogden*.[65] As Chief Justice John Marshall explained, the police powers:

HASTINGS CONST. L.Q. 267, 308-09 (1992). Perhaps this helps explain the highly-deferential treatment courts gave to exercises of the police power in the interests of public health, *see infra* Part III.D.2, if police powers are conceived to arise out of the willingness of individuals to be subjected to governmental regulation for societal benefits and sovereign governments in turn are obligated to provide such benefits in fulfillment of their obligations under the contract. *Id.* at 315-16.

[59] JAMES A. TOBEY, PUBLIC HEALTH LAW 37 (1926). *See also* Parmet, *supra* note 58 at 287 ("The welfare of each [person] was not irrelevant, but it was subordinate to the welfare of the whole").

[60] *Id.*

[61] *Id. See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 379 (2d ed. 1988).

[62] *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1 (1824).

[63] *Id.* at 87.

[64] ROETTINGER, THE SUPREME COURT *supra* note 31, at 6, *citing* Kansas v. Colorado [citation omitted].

[65] 22 U.S. 1 (1824). As reported in TOM CHRISTOFFEL & STEPHEN P. TERET, PROTECTING THE PUBLIC: LEGAL ISSUES IN INJURY PREVENTION 30 (1993). *But see* ROETTINGER, THE SUPREME COURT, *supra* note 31, at 10 (1957) (reporting that Chief Justice Marshall first

> form a portion of that immense mass of legislation which embraces everything within the territory of the state, not surrendered to the general government; all of which can advantageously be exercised by the states themselves. Inspection laws, *quarantine laws, health laws of every description* . . . are component parts of this mass.[66]

This "mass of legislation" coined by the Chief Justice as police powers in 1824 are the most dominant of any governmental power in the United States. As one state supreme court has exquisitely espoused:

> The police power is a great power. Without it the purpose of civil government could not be attained. It has more to do with the well-being of society than any other power. Properly exercised, it is a crowning influence. Improperly exercised, it would make of sovereign will a destructive despot, superseding and rendering innocuous some of the most cherished principles of constitutional freedom.[67]

Police powers are the broadest, "least limitable"[68] American governmental powers.[69] Exercises pursuant to police power extend to all public needs. As a result, police power is not confined to narrow categories or interpretations.[70] It has historically been equated with the very essence of state government power, nothing less than the authorization to legislate.[71] So much of what citizens of the United States take for granted including the very existence of government,[72] the security of the social order, the enjoyment of private life and property, and most notably the health of the community, are dependent upon the exercise of police power by state governments.[73]

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used the term "police power" in the 1827 decision of the Supreme Court, Brown v. Maryland [citation omitted]).

[66]Gibbons v. Ogden, 22 U.S. 1, 203 (emphasis added).

[67]Mehlos v. Milwaukee, 146 N.W. 882, 884 (Wis. 1914).

[68]Queenside Hills Realty Co., Inc. v. Saxl, 328 U.S. 80, 82 (1946) (Court upheld imposition of fire-safety building requirement on a New York commercial property owner despite its onerous expense of installing an automatic sprinkler system into an existing building).

[69]TOBEY, *supra* note 59, at 33 (1926).

[70]*See* ROETTINGER, THE SUPREME COURT *supra* note 31, at 11, *citing* Supreme Court decision in the Day-Brite Lightning case [citation omitted].

[71]*Id.* at 10, *citing* JUSTICE OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION (1951).

[72]16A AM. JUR.2D *Const. Law* § 364 (1979) (citations omitted).

[73]*Id.* (citations omitted).

D. American Police Powers and the Public Health

1. In General

In the field of public health law, police powers constitute the original source of governmental authority to act for the benefit of the public.[74] "Public health

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[74] Police powers are not the only powers retained by the states pursuant to the Tenth Amendment which are used in matters related to the public health. The states' exercise of its territorial jurisdiction under its *parens patriae* powers occasionally comes to play in issues of public health. The doctrine of *parens patriae* (which literally means "parent [or father] of the state") stems from the English statutory duty of the king, as father of his country, to provide and care for the less able citizens of society, the likes of which originally included idiots, lunatics, and orphans. *See* Neil B. Posner, *The End of Parens Patriae in New York: Guardianship Under The New Mental Hygiene Law Article 81*, 79 MARQ. L. REV. 603, 604 (1996) (Guardianship from the parens patriae doctrine first appears in English law with the passage of the statute, De Prerogativa Regis); Lisa Moscati Hawkes, *Parens Patriae and the Union Carbide Case: The Disaster at Bhopal Continues*, 21 CORNELL INT'L L.J. 181, 185 (1988). This vein of *parens patriae* power still has application in modern American law. States have a wide range of powers for limiting the freedoms of parents or guardians in the treatment of their minor children or incompetents, *see* 59 AM. JUR.2D *Parent and Child* § 11 (1987), enveloped in statutory procedures providing for the appointment of a guardian ad litem in the interests of a particular individual. Susan Harriman, *Parens Patriae Actions on Behalf of Indirect Purchasers: Do They Survive Illinois Brick*, 34 HASTINGS L. J. 179, 180 (1982).

Yet, as adopted by the states during their formative years as a part of their inherent powers of equity, the *parens patriae* powers were modified to encompass the new federal structure of government. Hawkes, 21 CORNELL INT'L L. J. at 186. *Parens patriae* powers were expanded to become "a tool that states use to protect the well-being of their citizens when no one citizen has standing to sue and thus cannot remedy the problem." *Id.* at 186-87. Thus, where a state can show it has a "quasi-sovereign" interest in protecting its citizens from certain activities or conduct of corporations, individuals, or other states, it may sue on its citizens' behalf to enjoin such actions.

American courts have typically recognized three particular interests of states as quasi-sovereign in nature. These include maintaining a state's rightful position in the federal government system, ensuring the well-being of the economy, and protecting the physical welfare of its citizens. *Id.* at 187. The latter of these three interests most relates to a state's use of its parens patriae powers in the field of public health. In Louisiana v. Texas, 176 U.S. 1 (1900), the Supreme Court articulated this latter concept of quasi-sovereign interest in its review of the State of Louisiana's attempt to enjoin a quarantine regulation enacted by the State of Texas. The Texas law banned the importation of all goods from the Louisiana port of New Orleans in light of an alleged threat of yellow fever. Although the Court denied jurisdiction to determine the propriety of the regulation, it did recognize the position of the State of Louisiana "in the attitude of parens patriae, trustee, guardian or representative of all her citizens . . . to seek relief . . . because the matters complained of affect her citizens at large." *Id.* at 19; *see also* Amelia C. Waller, *State Standing in Police Misconduct Cases: Expanding the Boundaries of Parens Patriae*, 16 GA. L. REV. 865, 874 n.52 (1982).

In Missouri v. Illinois, 180 U.S. 208 (1901), the State of Missouri sought to enjoin the Sanitary District of Chicago from discharging raw sewage into the Des Plaines River, a tributary to the Mississippi River. The Court upheld Missouri's parens patriae power to seek the injunction as a legitimate sovereign interest. *Id.* at 241. As the Court stated:

> The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced into

regulation has long been regarded as one of the states' primary and most important 'police powers."[75] Public health concerns lie at the core of the police power,[76] and concern matters which are particularly suited for state government because they are the repository of such powers.[77] As one legal commentator has stated:

> The exercise of the police power is really what [state] government is about: It defines the very purpose of government. Thus, on the state level, the power to provide for and protect the public health is a basic, inherent power of the government.[78]

The ways in which states, or their subsidiary municipal corporations, have traditionally legislated in the field of public health have been numerous. "Whatever rationally tends to promote and preserve the public health is an appropriate subject of legislation within the police powers of a state."[79]

Matters of public health which states regulate pursuant to their police powers are not limited solely to the prevention and control of contagious or dangerous diseases,[80] but rather include such matters as sanitation, waste disposal, pollution of water supplies, licensing and regulation of occupations, and injury prevention.[81] Police powers in a public health context authorize state governments to enact legislation to prevent and curtail disease through

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> the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State.

Id. Thus, states have historically been allowed to utilize their inherent *parens patriae* powers to protect the physical well-being of their citizens by enjoining public nuisances. Hawkes, 21 CORNELL INT'L L. J. at 186. Through the "quasi-sovereign" application of the parens patriae powers, states developed an enforcement route to protect the public health from influences outside the state's boundary, and thus beyond the traditional reach of its police powers.

[75]Women's Community Health Center of Beaumont, Inc. v. Texas Health Facilities Commission, 685 F.2d 974, 980, n. 11, *citing* Willson v. The Black Bird Creek Marsh Co., 27 U.S. 245, 251 (1829); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960); Sporhase v. Nebraska, 458 U.S. 941 (1982) ("a State's power to regulate . . . for the purposes of protecting the health of its citizens . . . is at the core of its police power").

[76]Parmet, *supra* note 58, at 272.

[77]*See, e.g.*, 39A C.J.S. *Health and Environment* § 5 (1976).

[78]GRAD, *supra* note 34, at 10; *see also* KENNETH R. WING, THE LAW AND THE PUBLIC'S HEALTH 19-20 (2d ed. 1985). For informative historical accounts of the police power, *see* Deborah Jones Merritt, *The Constitutional Balance Between Health and Liberty*, 16 HASTINGS CENTER REP., Dec. 1986 (Supp.) at 2; Parmet, *supra* note 58, at 267.

[79]*See* 39A C.J.S. *Health and Environment* § 5 (1976) (citations omitted).

[80]*Id.*

[81]TOM CHRISTOFFEL & STEPHEN P. TERET, PROTECTING THE PUBLIC: LEGAL ISSUES IN INJURY PREVENTION 25-28 (1993).

quarantine[82] and vaccination;[83] provide for the inspection of commercial and residential premises; remove and abate unsanitary conditions or other health nuisances;[84] regulate levels of air and water contaminants as well as restrict public access to polluted waters; exterminate vermin; fluoridify the city's water supply to control tooth decay;[85] and impose restrictions on certain occupations to eliminate health risks to those within the line of work or the public in general.[86] State health authorities have the power to take or destroy private property without compensation in their efforts to preserve public health.[87] As well, private individuals may be required to update or modify their sanitation systems, plumbing, or mere living conditions to maintain a healthy environment under the police power.[88]

2. Early Exercises of Police Powers in the Interests of Public Health[89]

Public health laws, originally calling for the isolation of the ill or quarantine of those exposed to contagious diseases,[90] have been passed at the local level under the equivalent of police powers since the formation of the colonies. The colony of Virginia passed a vital statistics law to track the health of the community in 1631. Massachusetts enacted the first sanitary legislation in America when it passed a maritime quarantine act in 1648 due to the threat of disease from the West Indies. A year earlier, Massachusetts also enacted a law to prevent the pollution of Boston Harbor. Laws regulating the practice of medicine were passed in Virginia in 1639, Massachusetts in 1649, and New York

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[82] *See, e.g.*, Leisy v. Hardin, 135 U.S. 100 (1890); Morgan's L. & T. R. & S.S. Co. v. Board of Health, 118 U.S. 455 (1886).

[83] *See, e.g.*, Zucht v. King, 260 U.S. 174 (1922); Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[84] 39 AM. JUR.2D *Health* § 26 (1968) (state citations omitted).

[85] *Id.* at § 22 (state citations omitted).

[86] *Id.* at § 25.

[87] *Id.* at § 33 (thus, piles of garbage breeding vermin and disease can be removed from private land without the consent of the property owner).

[88] *Id.* However, the police power of health authorities does not extend to appropriations of private property not otherwise creating a health nuisance or hazard for the sanctioned use of such authorities without compensation to the property owner. Such appropriations are likely to be considered illegal takings of property under federal and state constitutions for which just compensation is necessary. Thus, a health board cannot take possession of a private house to use as an emergency hospital or isolation center without the owner's consent and compensation thereto. *Id.* (state citations omitted).

[89] For an excellent review of the public health practices during the colonial and federalist periods in America, *see* Parmet, *supra* note 58, at 285-302.

[90] INSTITUTE, *supra* note 35, at 57.

and New Jersey in 1665.[91] Voluntary hospitals were established in Philadelphia in 1752 and New York in 1771.[92] Additional quarantine laws related to incoming sea vessels, loaded with goods and often disease, were passed in Maryland (1784), New Hampshire (1789), Virginia (1792), Georgia (1793), Connecticut (1795), and Delaware (1797).[93]

The first local health board was reportedly organized in Baltimore, Maryland in 1793. Philadelphia followed suit a year later. In 1797, Massachusetts promulgated a law providing for the organization of health boards in towns and delegating to these boards the power to make regulations. Health boards formed in other towns across the new nation as states copied the Massachusetts model. Thus, public health duties among the first states of the Union were delegated to local boards at the municipal level from early on.[94] Only later did state governments form state-wide boards of health, Louisiana being the first to do so in 1855 (although the District of Columbia formed its district-wide board as early as 1822).[95]

With the formation of local health boards, state public health laws and regulations became more widespread in the late eighteenth and early nineteenth centuries.[96] In the beginning, courts were highly deferential to public health regulations under the police powers.[97] In general, courts validated all rules and regulations of local health authorities which were reasonably calculated to preserve the health of the public.[98] Laws or regulations necessary to protect the public health were considered legislative questions for local and state health authorities, not questions subject to judicial review. The court's perceived role was limited primarily to determining whether health officials acted within their permissible jurisdiction, or had otherwise abused their authority. When courts did undertake review of public health measures, every reasonable presumption was made in the favor of the validity of such actions. The burden of establishing the invalidity of a health board order or regulation was on the person or group of persons attacking it.[99]

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[91] TOBEY, *supra* note 59, at 10 (1926).

[92] INSTITUTE, *supra* note 35, at 58.

[93] *See* Gibbons v. Ogden, 22 U.S. 1, 114-15 (1824).

[94] TOBEY, *supra* note 59, at 44 (1926); *see also* INSTITUTE, *supra* note 35, at 62.

[95] *Id.*

[96] *See generally* Deborah Jones Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U.L. REV. 739 (1986); Wendy Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985).

[97] *See, e.g.*, City of Little Rock v. Smith, 163 S.W.2d 705, 707-08 (Ark. 1942) ("private rights . . . must yield in the interest of the public security," venereal disease "affects the public health so intimately and so insidiously, that consideration of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril.").

[98] 39 AM. JUR.2D *Health* § 22 (1968) (citations omitted).

[99] *Id.* at § 21.

Not surprisingly, most statutes and early court decisions presumed the pre-eminence of public health interests over individual rights. In some cases, judicial deference was absolute as courts suggested that police power regulation was immune from constitutional review, expressing the notion that, "where the police power is set in motion in its proper sphere, the courts have no jurisdiction to stay the arm of the legislative branch."[100] Other state courts were unwilling to allow state and local health authorities free reign over matters of public health. They were skeptical of public health actions which purported to protect the public, but in reality involved some arbitrary interference with private business or imposed unusual and unnecessary restrictions upon lawful activities.[101] Although the constitutional foundation for the exercise of *compulsory* police powers, at least, was public health necessity,[102] some courts would not blindly approve such exercises.

Compulsory powers carried beyond the scope of public health necessity were at times subject to strict judicial review.[103] If doubt existed as to the actual purpose of the exercise of compulsory public health powers, courts would likely delve into the legislative directive and history to discover the true intent of the specific regulation. A substantial line of cases required medical proof that individuals subjected to compulsory public health powers were actually infectious when the control measures were imposed.[104] As one court in New York held in 1896: "[t]he mere possibility that persons may have been exposed to such disease [smallpox] is not sufficient [to impose control measures] . . . . They must have been exposed to it, and the conditions actually exist for a

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[100] Arizona v. Southern Pacific Co., 145 P.2d 530 (1943) (quoting *State ex rel.* McBride v. Superior Court, 174 P. 973, 976 (1918)); *see also* Lawrence O. Gostin, *The Americans With Disabilities Act and the Corpus of Anti-Discrimination Law: A Force for Change in the Future of Public Health Regulation*, 3 HEALTH MATRIX J. OF L. MED. 89, 91 (1993) ("The early courts were highly deferential to state public health regulation under the police powers. To some courts, the Constitution had 'no application to this class of case,'" *citing In re Caselli*, 204 P. 364, 364 (1922)).

[101] *See* Lawton v. Steele, 152 U.S. 133 (1894); Jew Ho v. Williamson, 103 F. 10 (C.C.N.D. Cal. 1990).

[102] *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (the right of a state to protect the public health can only arise from a vital necessity, and cannot be carried beyond the scope of that necessity).

[103] *Id.*

[104] Railroad Co. v. Husen, 95 U.S. 465, 471-73 (1887) (state prohibition of transporting foreign cattle, whether diseased or not, placed an unconstitutional burden on interstate commerce); Ex parte Martin, 188 P.2d 287 (Cal. App. 1948) (public health officials must have "probable cause" to quarantine pending an opportunity for further investigation or examination); Ex parte Shepard, 195 P. 1077 (Cal. App. 1921) (court specifically rejected proposition that mere suspicion is sufficient to uphold a quarantine order); Ex parte Arata, 198 P. 814 (Cal. App. 1921) (court required that reasonable ground must exist to support the claim that the person is afflicted with venereal disease); Ex parte Dillon, 186 P. 170 (Cal. App. 1919) (marital status cannot constitute "reasonable cause" for suspicion of venereal disease); People v. Tait, 103 N.E. 750 (Ill. 1913) (family member not residing in household affected by scarlet fever should not be quarantined).

communication of the contagion."[105] The same court went on to insist that these issues are to be determined by "medical science and skill, not common knowledge."[106]

One of the most invidious public health measures was struck down in 1900 by a federal court in *Jew Ho v. Williamson*.[107] Public health officials had quarantined an entire district in San Francisco for the stated purpose of containing an epidemic of bubonic plague. Most of the 15,000 people packed into the quarantined area were Chinese immigrants. Where facts revealed that the plague is most easily communicated in cramped and unsanitary conditions, the court found that the public health measure actually posed a danger to the health of the community.[108] In striking down the quarantine law, it recognized the pretext of using public health necessity as a guise for discrimination against the Chinese community.[109]

These principles were buttressed and further clarified by the Supreme Court's enduring decision in 1905, *Jacobson v. Massachusetts*.[110] *Jacobson* remains a forceful statement by the Court of the constitutional limits of the exercise of police powers in the interests of public health.[111] The case concerned the validity of a Massachusetts state law which required local boards of health to require vaccinations of citizens when necessary in the interests of public health or safety. Such vaccinations were to be provided without charge, although anyone who refused to comply could be fined.

Pursuant to this state law, the Board of Health of the City of Cambridge adopted a regulation requiring the smallpox vaccination or revaccination of all city residents. Jacobson, unwilling to be vaccinated or pay a fine, was brought to court by the State on criminal charges of refusing or neglecting to comply with the regulation. His essential argument was that the vaccination requirement invaded his right to liberty under the federal Constitution in so much as it constituted an "assault upon his person."[112] The Court was unpersuaded. In rejecting Jacobson's argument, it relied upon the authority of states to enact mandatory vaccination statutes under the police powers. A state's police powers authorize it to enact "all laws that relate to matters *completely within its territory* and which do not by their necessary operation

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[105]Smith v. Emery, 42 N.Y. 258 (1896).

[106]*Id.* at 260.

[107]103 F. 10 (C.C.N.D. Cal. 1900).

[108]*Id.* at 22 ("It must necessarily follow that, if a large territory is quarantined, intercommunications of the people within that territory will rather tend to spread the disease than to restrict it").

[109]*Id.* at 24.

[110]197 U.S. 11 (1905).

[111]*See* GOSTIN *supra* note 100, at 92 ("modern constitutional review is remarkably similar in approach to *Jacobson*").

[112]Jacobson, 197 U.S. at 27.

affect the people of other States."[113] This includes, of course, "'health laws of every description.'"[114]

However, the Court was quick to condition its support of exercises of state police powers in interest of public health. As emphasized above, no such power can be exercised to regulate public health matters outside a state's territory. In addition, no such power can be exercised so as to contravene the federal Constitution or laws nor the rights of those entitled to their protection. The Court also limited the breadth of state police powers by conditioning their exercise in the interest of public health through reasonable regulations designed to protect the public health and safety without seriously impairing the health of any particular individual. The authority of states via police powers does not extend to worthless, blanket provisions restricting personal freedoms in the name of public health. The means of enforcement of public health laws must have some "real or substantial relation to the protection of the public health and the public safety."[115] In upholding the statutory exercise of power in *Jacobson*, the Court deferred to the judgment and testimony of state and local board of health officials, as well as the commonly-held medical position of the time, that smallpox vaccinations were instrumental in limiting the spread and impact of the disease.

Finally, the Court imposed a new condition on the existing statute that it not be administered against anyone who "with reasonable certainty" can show he is not a "fit subject of vaccination,"[116] or would suffer a serious impairment to his health as a result of vaccination, or that such would likely cause his death. Since Jacobson could not make such a showing, his constitutional argument was promptly rejected. Ultimately the vaccination regulation of the Board of Health of the City of Cambridge requiring the smallpox vaccination or revaccination of all city residents was upheld. Although the "arbitrary, oppressive, and unreasonable"[117] standard announced by the Court was deferential to state public health regulations, the Court would not support any regulatory measure which was wholly irrational, indiscriminate, or enacted in bad faith.

Despite the admonitions set forth in *Jacobson*, some state courts continued their practice of almost blind deference to the exercise of police powers by health boards. In a 1913 case, *State v. Rackowski*,[118] the Connecticut Supreme Court did not require any more than "common knowledge" evidence in deciding whether or not a person had scarlet fever for the purpose of imposing

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[113] *Id.* (emphasis added).

[114] *Id.*

[115] *Id.* at 31.

[116] *Id.* at 37.

[117] Jacobson, 197 U.S. at 27.

[118] 86 A. 606 (Conn. 1913).

public health measures.[119] In *Kirk v. Wyman*,[120] an elderly woman with anaesthetic leprosy was isolated even though there was "hardly any danger of contagion."[121] She had lived in the community for many years, attended church services, taught in school, and mingled in social life without ever communicating the disease. The South Carolina Supreme Court thought it "manifest that the board [was] well within [its] duty in requiring the victim of it to be isolated" when the "distressing nature of the malady is regarded."[122] The court deferred to the actions of the local health board despite the fact that Mrs. Kirk's disease was incurable and her isolation would be indefinite. The only consolation offered by the court was that the victim's isolation must wait for the completion of a "comfortable cottage" outside the city limits, rather than the shotgun pesthouse within a hundred yards of the city's trash dump which the health board proposed as an adequate place for Mrs. Kirk.[123]

Abominable decisions like *Kirk* tapered off as the principles of *Jacobson* became enforced more regularly in the following years by state and federal courts.[124] Although public health authorities were entitled to the due deference of courts, their public health measures were subjected to further scrutiny in an attempt to eliminate the sort of abuses which *Jacobson* addressed. Courts subsequently buttressed their injunctions of the use of police powers for public health purposes by demonstrating the unconstitutional infringement of private rights as a result of such exercises. While the results of judicial intervention in the field eliminated some of the legal abuses of local authorities in the guise of public health, it also marked a shift of the exercise of public health powers. Police powers were no longer considered absolute, but rather were conditioned by the increasing restraints of individual federal constitutional rights. This shift represents a subtle intrusion of state police powers by the federal government. The next intrusion by the federal government power over the traditional police powers of the states in the field of public health would be more direct.

IV. THE FEDERAL ROLE IN PUBLIC HEALTH LAW

As discussed in Part II, states intended to retain their sovereignty by reserving for themselves the majority of government powers. States specifically guarded against the potential for a dominant, centralized government through the insistence of federalism safeguards as part of their agreement to enter the Union. Perhaps this helps to explain states' fervent representation in support

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[119] *Id.* at 608.

[120] 65 S.E. 387 (S.C. 1909).

[121] *Id.* at 390.

[122] *Id.*

[123] *Id.* at 391.

[124] *But see* Gostin, *supra* note 100, at 91 ("Even as late as 1966, a court held that 'drastic measures for the elimination of disease are not affected by constitutional provisions, either of the state or national government'" (*citations omitted*)).

of exercises of its police powers in the interest of public health against federal constitutional challenges in cases like *Jacobson v. Massachusetts*.[125]

In practice, however, the history of American government has seen the gradual centralization and consolidation of governmental power into the national realm, contrary to the vision of the founders of the Union.[126] "Despite the preeminence of the States in matters of public health and safety, in recent decades the Federal Government has played an increasingly significant role in the protection of the health of our people."[127] There are many factors which have contributed to this long-term development, including varying patterns of economic growth, shifts in population to urban areas, societal changes, and, of course, the Civil War and the Fourteenth Amendment.[128] However, the historical backdrop for the major centralization of American government lies in the policies and practices of the federal government during the New Deal (1933-1946).[129]

A. Early Federal Involvement in Public Health

Prior to the New Deal era, state and local governments were the principal sources of political, economic, and social policies for the nation.[130] As discussed in Part III.D, public health regulation was exclusively a state function. Even during the seventy years leading up to the New Deal, "[a] bewildering array of *state* agencies, boards and commissions dealing with taxation, *public health*, public utilities, housing and a multitude of other concerns came into being."[131] The federal government was preoccupied with determining the limits of its own enumerated powers and fending off challenges to exercises of its powers by the states. This is not to say that the federal government had no role in the field of public health during this time, but to emphasize that its role was limited.

Early federal involvement in public health began with the establishment of the Marine Hospital Service to care for merchant seamen who had no local citizenship and thus could not rely on state health services. A national board of health adopted in 1879 to take over the responsibilities of the Marine Hospital Service was opposed by the states and the Service alike, and was

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[125] 197 U.S. 11 (1905). *See also, supra*, Part III.D.2.

[126] ROETTINGER, THE SUPREME COURT, *supra* note 31, at 12.

[127] Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240, 2245 (1996).

[128] ROETTINGER, THE SUPREME COURT, *supra* note 31, at 14, *but see* Flores v. City of Boerne, 73 F.3d 1352, 1357 (5th Cir. 1996) ("the power granted to Congress [under the Fourteenth Amendment] was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated power into a central government of unrestrained authority over every inch of the whole Nation").

[129] Lesser, THE COURSE OF FEDERALISM, *supra* note 9, at 6.

[130] *Id.* at 3.

[131] *Id.* at 5, *citing* Morton Keller, *State Power Needn't Be Resurrected Because It Never Died*, GOVERNING 55 (1988) (emphasis added).

promptly disassembled in 1883.[132] Four years later, however, the National Hygienic Laboratory was established in the Marine Hospital in Staten Island, New York.[133] Later, in 1930, the Laboratory would relocate in Washington, D.C. under its new name, the National Institutes of Health.[134] In 1906, Congress passed "its first significant legislation in the field of public health," the Food and Drug Act, in its national effort to regulate the manufacture, labeling, and sale of food.[135] By 1912, the Marine Hospital Service was renamed the United States Public Health Service, although its services to the public remained modest in their extent. The Chamberlain-Kahn Act of 1914 established the U.S. Interdepartmental Social Hygiene Board which set forth a comprehensive venereal disease control program for the military, but also provided funds to the states for the quarantine of infected civilians.[136] The Department of Labor housed the Children's Bureau, which investigated the causes of infant mortality and issues of child hygiene, and the Women's Bureau which concerned itself with the health and welfare of women in industry.[137]

Federal involvement in public health rose to a new level with the passage of the Federal Maternity and Infancy Act,[138] also known as the Sheppard-Towner Act of 1922, which was the first act to provide direct federal funding of personal health services.[139] The Children's Bureau was charged with administering the Act which created the Federal Board of Maternity and Infant Hygiene and provided funds to states to initiate programs in maternal and child health. Federal funds were conditioned on the states' development of an obstetrics plan for the care and treatment of expectant mothers to be administered by a state agency, the operations of which would be reported to the Board. Besides the initial plan development and reporting requirements, the program was exclusively under state control. This ability of Congress to condition the receipt of federal funds by the states upon the performance of federal guidelines, standards, or requirements would become an impetus to increased national involvement in public health regulation.[140]

B. The New Deal and the Death of Federalism

By the time President Franklin Delano Roosevelt (FDR) first took office in 1933, the nation had survived the greatest challenge to its existence during the

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[132] INSTITUTE, *supra* note 35, at 62.

[133] *Id.* at 67.

[134] *Id.* at 68.

[135] *See* Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240, 2245-46 (1996).

[136] INSTITUTE, *supra* note 35, at 67.

[137] TOBEY, *supra* note 59, at 27.

[138] *Id.*

[139] *Id.*

[140] *Id.*

Civil War.[141] The Sixteenth Amendment was added to the Constitution, thus allowing for the imposition of a national income tax to generate significant national revenues. Although the federal government's role in public health remained limited, national legislation on matters within the field had been passed. Congress had already enacted laws to conserve the nation's natural resources and to protect the nation's citizens from adulterated food and dangerous medicines.[142] Signs of increased federal involvement in the lives and welfare of its citizens were already present as the United States faced the Great Depression.

The great legislation rush of the New Deal began with the passage of fifteen separate national acts in Congress within the first hundred days of FDR's presidency.[143] The jurisdictional basis of much of this legislation rested on the hopeful expansion of the Commerce Clause to allow Congress the power to legislate in the interest of interstate commerce in areas generally regulated by state and local authorities. As well, FDR relied on interpretations of the spending power to allow the federal government to condition the states' receipt of federal funds on the performance of federal objectives and the Necessary and Proper clause to allow Congress to spend money in aid of the general welfare. The culmination of these legislative acts threatened the traditional sense of federalism which preserved much of the legislative subject-matter to the control of the states.

The Supreme Court initially proved a bulwark of federalism on behalf of the states. It invalidated numerous pieces of New Deal legislation on the grounds that the federal Commerce power did not reach the specified local activities of the legislation under the principles of federalism.[144] As the Court stated in its decision in *United States v. Butler*,[145] which invalidated the Agricultural Adjustment Act of 1933, the expansion of the Commerce power in the federal government might obliterate: "the independence of the individual states . . . and [convert] the United States . . . into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states."[146]

FDR was unwilling to accept the hard-lined, federalist approach of the Court toward his administration's objectives. The Court was forced to relax its federalist opposition to the New Deal legislation when FDR threatened it with

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[141] Lesser, THE COURSE OF FEDERALISM, *supra* note 9, at 4-5.

[142] *Id.* at 6, *citing* Samuel E. Morison, Henry S. Commager, & William E. Leuchtenburg, THE GROWTH OF THE AMERICAN REPUBLIC 306-09 (1980).

[143] Lesser, THE COURSE OF FEDERALISM, supra note 9, at 7.

[144] *Id.*

[145] 297 U.S. 1 (1936).

[146] *Id.* at 77.

his "court-packing" plan.[147] Before Congress had seriously considered implementing FDR's plan, the Court appeased the political forces in a series of decisions which opened the door to federal centralization under the Commerce and Spending powers. In April 1937, the Court upheld the National Labor Relations Act which guaranteed the right of collective bargaining for labor forces.[148] A month later the Court sustained federal and state legislation which created social security benefits in three separate opinions.[149] These decisions collectively upheld (1) the use of federal tax and spending powers solely for matters related to the general welfare; (2) the conditioning of federal grants to the states on their acceptance of Congressionally-mandated requirements; and (3) the constitutionality of both practices despite the Tenth Amendment.[150]

Finally, in 1941, the Court delivered a definitive opinion of Congress' newly-acquired powers under the Commerce Clause. In *United States v. Darby*,[151] which upheld the Fair Labor Standards Act of 1938, the Court clarified that Congress' commerce power was not limited by the states' police power. In so much as the Tenth Amendment "states but a truism that all is retained which has not been surrendered,"[152] the Court held that congressional exercises of commerce power may be "attended by the same incidents which attend the exercise of the police power of the states."[153] The Court's decision in *Darby* dispelled all rumors that federalism was simply on the decline: rather, it appeared federalism was gasping its last breath.[154]

The reinterpreted Commerce Clause effectively gave the federal government national police powers.[155] Such unlimited power, when exercised under the Supremacy Clause, allowed Congress to preempt any state laws or regulations

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147Lesser, THE COURSE OF FEDERALISM, *supra* note 9, at 7 (According to the "court-packing" plan, FDR proposed that the President would be able to appoint one new Supreme Court justice, up to a maximum of six, for every Justice who, having reached age seventy and having served for ten years, failed to retire. The plan was immediately challenged on constitutional grounds, but ultimately was not acted upon by Congress).

148NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

149Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (upholding employer's tax to fund unemployment compensation under the Social Security Act of 1935); Helvering v. Davis, 301 U.S. 619 (1937) (upholding tax to fund old-age benefits under the Social Security Act of 1935); and Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) (upholding the validity of various provisions of the Alabama Unemployment Compensation Law).

150Lesser, THE COURSE OF FEDERALISM, *supra* note 9, at 8.

151312 U.S. 100 (1941), *overruling* Hammer v. Dagenhart, 247 U.S. 251 (1918).

152*Id.* at 124.

153*Id.* at 114.

154*See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 23 (1950).

155Lesser, THE COURSE OF FEDERALISM, *supra* note 9, at 9.

on virtually any subject in which it chose to act.[156] Over the next few decades Congress would use its commerce, taxing, and spending powers to introduce national policies and objectives into many areas previously left to the states with general acquiescence by the courts.[157] As one author stated, "legal federalism," conceived, debated, and drafted into our constitutional framework to act as a true barrier between state and federal governmental power, "is dead."[158] What remained was a sort of "political federalism," used in token fashion to argue for or against the continued federal intrusion of states' traditional powers.[159]

C. The Federal Role in Public Health: Post New Deal

In light of these developments, it is not surprising that the federal role in regulating public health became increasingly prominent during the New Deal and thereafter. "Federal programs in disease control, research, and epidemiology expanded throughout the mid-twentieth century."[160] The Social Security Act of 1935, which set the stage for the Court's approval of the use of federal tax and spending powers in matters related to the general welfare, included within its many titles a federal grant-in-aid program to encourage states to establish and maintain public health services and train public health personnel. "Supporters of the [Social Security Act said] that its operation [was] not a constraint [on state's rights], but the creation of a larger freedom, the states and the nation joining in a co-operative endeavor to avert a common evil."[161] Subsequent titles[162] to the Social Security Act in 1966 established the Medicare and Medicaid programs which provided federal payments for health services to the elderly and joint federal-state payments for health services to the poor.[163]

The National Institute of Health (NIH) significantly expanded its research mission to include the study and investigation of all diseases. In 1937, the National Cancer Institute became the first of many institutes within NIH to concentrate its efforts on a particular disease or condition.[164] In 1938, Congress

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[156] REPORT WORKING GROUP, *supra* note 17, at 80, 88.

[157] Lesser, THE COURSE OF FEDERALISM, *supra* note 9, at 10-11.

[158] *Id.* at 11, *citing* Richard B. Cappalli, *Restoring Federalism Values in the Federal Grant System*, 19 URBAN LAWYER 499 (1987).

[159] Lesser, THE COURSE OF FEDERALISM, *supra* note 9, at 11-12, *citing* Richard B. Cappalli, *Restoring Federalism Values in the Federal Grant System*, 19 URBAN LAWYER 499, 506 (1987).

[160] INSTITUTE, *supra* note 35, at 68.

[161] Steward Machine Co. v. Davis, 301 U.S. 548, 587 (1938) (upholding the Social Security Act).

[162] Titles 18 and 19, SSA, respectively.

[163] INSTITUTE, *supra* note 35, at 68.

[164] *Id.* Other institutes within the NIH include, among others, the Institute for Neurological and Communicative Disorders and Stroke, the Institute for Child Health and Human Development, the Institute for Environmental Health Sciences, and the

passed a venereal disease control act in addition to the Chamberlain-Kahn Act of 1914. This second act provided federal funds to the states for investigation and control of venereal diseases. The Federal Security Agency was established in 1939 and within it the Public Health Service and national programs in education and welfare were created. The National Mental Health Act of 1946 established the National Institute of Mental Health as part of the NIH which was instrumental in financing training programs for mental health professionals and the development of local community health services.[165] Two decades later, the Partnership in Health Act of 1966 provided federal funding of state and local activities concerning public health as an incentive for the further development of such services at the subnational level.[166] The Comprehensive Health Planning Act of 1967 allowed federal funding of neighborhood or community health centers, which although governed by local boards, relied on the federal government for policy and program direction.

Activities of state and local public health authorities have increasingly been influenced or overtaken by federal programs, grants, initiatives, or laws. Federal regulation now reaches broad aspects of public health such as air and water quality,[167] food and drug safety,[168] tobacco advertising,[169] pesticide production and sales, consumer product safety, occupational health and safety, and medical care.[170] As the Institute of Medicine has recently summarized, the federal government:

> surveys the population's health status and health needs, sets policies and standards, passes laws and regulations, supports biomedical and health services research, helps finance and sometimes delivers personal health services, provides technical assistance and resources to state and local health systems, provides protection against

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Institute of Mental Health. *Id.*

165 *Id.*

166 *Id.* at 69.

167 *See, e.g.*, Acorn v. Edwards, 81 F.3d 1387, 1388 (5th Cir. 1996) *cert. denied*, 117 S. Ct. 2532 (1997) (explaining the purpose of the Lead Contamination Control Act of 1988, which amended the Safe Drinking Water Act, to regulate levels of lead in supplies of drinking water).

168 *See* Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240, 2245-46 (1996) (detailing the history and purposes of the Food and Drug Act of 1906).

169 *See* Cippolone v. Liggett Group, Inc., 505 U.S. 504, 512-15 (1992) (outlining the history of federal legislation regulating the advertising of tobacco products and health warning requirements).

170 The Clinton Administration has identified several areas within the field of public health where national oversight is recommended, including infectious diseases, chronic and environmentally-related diseases, violence and injury control, comprehensive school health, maternal and child health, public health surveillance, epidemiologic services, and information networks. The White House Domestic Policy Council, The President's Health Security Plan: The Clinton Blueprint 165-69 (1993).

international health threats, and supports international efforts toward global health.[171]

The United States Public Health Service, now a part of the Department of Health and Human Services, is the federal unit with primary responsibility for national public health.[172] Its organization includes the Centers for Disease Control (CDC); the National Institutes of Health (NIH); the Food and Drug Administration (FDA); the Health Resources and Services Administration; the Alcohol, Drug Abuse, and Mental Health Administration; and the Agency for Toxic Substances and Disease Registry. The Health Care Financing Administration, also part of the Department of Health and Human Services, operates the Medicare and Medicaid programs.[173] Other divisions of the Department of Health and Human Services engage in health-related activities although they are oriented toward human and social services.[174]

The expansion of national powers into the field of public health prompted a change in public health objectives. Public health law was no longer confined to the exercise of police powers within the limited territory of each state. National police powers under the Commerce Clause allowed for the development of national public health goals. This necessitated a fundamental restructuring of public health philosophy.[175] Merely controlling the effects of public health problems was inadequate. National powers allowed for the broad regulation of the very conditions which led to such problems. Thus, public

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[171] INSTITUTE, *supra* note 35, 165.

[172] The Public Health Service is not the only federal agency which is concerned with public health on a national scale. According to the Institute of Medicine, other federal agencies or department divisions handle health-related problems of a specific nature or population. Such include the medical divisions of the armed forces, the Veteran's Administration, the Bureau of Indian Affairs, the Agricultural Extension Service, the Department of Education, the Occupational Health and Safety Administration, the Federal Trade Commission, the Bureau of Labor Standards, the Bureau of Mines, the Maritime Commission, multiple bureaus within the Department of Agriculture, and the Bureau of Employee's Compensation. In addition, the Environmental Protection Agency provides invaluable assistance in public health concerns such as water and air pollution, hazardous waste cleanup, pesticide control, and radiation protection. *Id.* at 192.

[173] *Id.* at 166-67.

[174] *Id.* at 168. The Institute of Medicine cites as an example the Office of Human Development Services which houses the Administration on Aging and the Administration on Developmental Disabilities, both of which are involved in long-term health care issues. *Id.*

[175] The "new paradigms" of public health law recently advocated by Professor Lawrence O. Gostin of Georgetown University Law Center presuppose a national public health system working within an international penumbra. They include (1) the focus on scientifically objective assessments of significant risk rather than remote or speculative risks; (2) ecologic understandings of injury and disease rather than discrete causes; and (3) a synergistic relationship between public health and human rights. *See* GOSTIN, *supra* note 36.

health strategy has changed from the localized treatment and prevention of public health dilemmas to the advance control of the conditions in which such effects arose.

While the movement toward a more centralized approach in handling the public health needs of a nation originated through a few scattered pieces of Congressional legislation and executive oversight, the New Deal proved to be fertile ground for its growth. Federal intervention into the field of public health after the New Deal era helped to either remove complete control over certain health matters from local authorities or provide national standards for public health measures. Substantial federal programs to improve the public health were conceived, passed, and administered during this period. The Supreme Court bowed to political forces to approve each program, whether directly or indirectly. Needy states desiring federal funds and not to be outdone by each other succumbed to federal constraints on the receipt of such monies. State challenges to federal impositions on their traditional sovereign powers fell flat given the revamped supremacy of federal laws under the Constitution.[176] Regardless of the positive attributes of the centralization of public health efforts,[177] it remains an important observation of the New Deal that it was an era that saw the destruction of federalism as it was originally conceived and the creation of a national public health agenda as it presently exists.

V. THE FUTURE OF FEDERALISM AND POLICE POWERS IN PUBLIC HEALTH LAW

As illustrated in Parts III and IV, the development of the conception of public health from a purely local to national concern has occurred simultaneously over decades with a weakened interpretation of federalism. Though conceived as an affirmative principle upholding states' rights and powers against federal intrusion of any kind, federalism was reduced to a mere political theory of American government during the New Deal. States' police powers traditionally used to further the public health have been circumvented by their equivalent powers at the federal level, the commerce and spending powers. The result is a modern public health system driven by national priorities in the pursuit of national health goals.[178] While the existing allocation of powers

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[176]For an additional discussion of the role of federalism in the field of health care law, *see, e.g.*, Tracey Stelzer, *Health Care Federalism and Public Opinion*, 28 CONN. L. REV. 149 (1995).

[177]There are many attributes of a nationalized public health system, including the deemphasis on the varied and confusing web of state public health laws which had developed over decades of exclusive state control over the field. *See* Lawrence O. Gostin, Zita Lazzarini, and Scott Burris, *Improving State Law to Prevent and Treat Infectious Disease*, MILBANK MEMORIAL FUND (1998).

[178]GRAD, *supra* note 34, at 14. ("Through . . . categorical grant-in-aid programs, the federal government influences the manner in which public health is administered and the methods of service delivery. The taxing and spending power clearly has as much impact on public health as does the more direct exercise of power under the interstate commerce clause").

between national and state governments seems well-suited to accomplishing these national public health objectives, there is just one problem. *Federalism is back.*

A. Modern Interpretation of the Principle of Federalism and Public Health Law

Whatever significance (or lack thereof) federalism has been given in the past, there has been a recent resurgence of interest in the concept.[179] What has been coined *new federalism*[180] is a principle of political change spurred by mini-revolutions among the states and enveloped in the idea that the existing powers of the federal government should be limited and returned to the states.[181] The resurgence of federalism is partially the result of increased political efforts of the states to move toward greater autonomy from the federal government and the effects of such efforts on the political processes on Capitol Hill.[182] However, just as the Supreme Court's role in the shift of federalism away from the states during the New Deal was instrumental (even if compelled), so too does the Court represent the bastion of change in modern legal thought on the principle.

A landmark case in support of the traditional powers of states was decided in 1976 in *National League of Cities v. Usery*.[183] In 1974 Congress amended the Fair Labor Standards Act to cover virtually all employees of state and local governments. Municipal and state governments challenged the amendment of the Act as an unconstitutional intrusion upon the traditional functions of state and local governments.[184] Justice Rehnquist, writing for a 6-3 majority of the

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[179]Since 1990, the Supreme Court has decided 74 cases which concern or at least refer to the principle of federalism in their decisions.

[180]The term "new federalism" may have first been used by Donald E. Wilkes, Jr. in his article, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

[181]Richard C. Reuben, *The New Federalism*, A.B.A. J., Apr. 1995, at 76-77. Whether the concept is a necessarily recent development is itself a point of debate. In 1957, Ruthe Locke Roettinger noted in her book *The Supreme Court and State Police Power: A Study in Federalism* that, "The states were never more loved than they are today. There is much talk about bringing government back home from Washington. The states hold the answers to many of our problems, it is said." *Id.* at 1.

Other authors have equated new federalism with the legal movement among state courts of the importance of state law and the independent interpretations of state constitutional law which distinguish state rights from those at the federal level. *See* Lisa D. Munyon, *It's A Sorry Frog Who Won't Holler in his Own Pond: The Louisiana Supreme Court's Response to the Challenges of New Federalism*, 42 LOY. L. REV. 313 (1996).

[182]*See* John K. Iglehart, *Health Policy Report: Politics and Public Health*, 334 NEW ENGL. J. MED. 203 (January 18, 1996) ("The rush to shrink the federal government and reduce its costs, propelled by the Republican-controlled Congress with the reluctant acquiescence of the Clinton administration, has begun to change the Public Health Service and other federal health agencies in important ways").

[183]426 U.S. 833 (1976).

[184]*Id.* at 839.

members of the Supreme Court, held that Congress lacked the jurisdictional power under the Commerce Clause to regulate the wages and hours of public employees engaged in "integral operations in areas of traditional governmental functions."[185] Among the functions which the Court considered to traditionally be under the jurisdiction of state police powers included fire prevention, police protection, sanitation, and public health:

> These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which States have traditionally afforded their citizens.[186]

Although the Court's opinion in *National League* was later overruled in *Garcia v. San Antonio Metropolitan Transit Authority*,[187] the viability of federalism remains. With the promotion of Justice Rehnquist, a staunch supporter of state sovereignty,[188] to Chief Justice in 1986 and the addition of federalist Justice Sandra Day O'Connor, the Supreme Court has built on the foundation it first laid in *National League*.[189]

A crucial block of this foundation was set in 1991 with the Court's decision in *Gregory v. Ashcroft*.[190] The Court upheld a Missouri state constitutional provision that required the mandatory retirement of state judges despite an apparent conflict with the federal Age Discrimination in Employment Act of 1967 (ADEA).[191] In her majority opinion, Justice O' Connor maneuvered

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[185] *Id.* *See also* Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (Tenth Amendment restricts Congress from exercising power so as to impair the States' integrity or their ability to function in a federal system).

[186] National League of Cities, 426 U.S. at 851.

[187] 469 U.S. 528 (1985).

[188] Joan Biskupic, *Justices Shift Federal-State Power Balance*, WASH. POST, Mar. 29, 1996, at A1 ("Rehnquist has made it his mission to protect states' rights since he joined the Court in 1971 . . . .")

[189] Richard C. Reuben, *The New Federalism*, A.B.A. J., Apr. 1995, at 78-79. This is not to say that the Court's federalism jurisprudence since National League of Cities v. Usery, 426 U.S. 833 (1976), has been consistent. As the Court acknowledged in New York v. United States, 505 U.S. 144, 160 (1992), "[t]he Court's jurisprudence in this area has traveled an unsteady path."

[190] 501 U.S. 452 (1991).

[191] *Id.* at 454. Article V, Section 26 of the Missouri Constitution required most state judges to retire at the age of seventy, including those appointed by the Governor. Several state judges subject to the mandatory retirement provision challenged the law as violative of the Federal Age Discrimination in Employment Act of 1967 (A.D.E.A.), 29 U.S.C. §§ 621-34 (1996), which makes it unlawful for employers, including states and their political subdivisions, to discharge any individual who is at least forty years old because of such individual's age. 29 U.S.C. §§ 623(a), 631(a), 630(b)(2) (1996). Accordingly, the judges argued, the state constitutional provision was preempted by the (A.D.E.A.), and thus was invalid. *Id.* at 456.

around the appointed state judges' argument that their own state constitutional provision was preempted by the ADEA by finding that they were not covered by the Act's provisions,[192] despite a weak statutory basis for the Court's holding.[193]

The imprimatur for the Court's decision in *Gregory* was the principle of federalism. Recounting the historical development of the United States as a nation of united sovereign states,[194] Justice O' Connor analogized federalism as a constitutional concept of governmental design requiring a proper balance of power between the federal and state governments. For federalism to thrive, the powers of governments must be mutually restraining. Yet, the Court stated, "[the] twin powers [of government] will act as mutual restraints only if both are credible."[195] Although the Supremacy Clause allows Congress to impose its will upon the states, even in areas traditionally regulated by the states, federal power is not automatically supreme. Federalism demands that certain matters are "decision[s] of the most fundamental sort for a sovereign entity,"[196] including "the power to prescribe the qualifications of [its] own officers."[197] To allow Congress to unequivocally interfere with this right would "upset the usual constitutional balance of federal and state powers."[198] Thus, it is the duty of federal courts to be certain of Congress' intent before declaring that federal law overrides the balance of state and federal power. To this end, the Court applied the plain statement rule that Congress must "make its intention unmistakably clear in the language of the statute,"[199] that state law is preempted where such may alter the balance of federalism.[200]

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[192] *Id.* at 467. The Court determined that appointed state judges were not considered "employees" under the ADEA, relying on the A.D.E.A.'s coverage exception for any state employee who qualified as "an appointee on the policymaking level . . . ." *Id.* at 465, *citing* 29 U.S.C. § 630(b)(2) (1996). Appointed state judges are exempted from the Act, said the Court, not because they are necessarily defined as appointees on the "policymaking level," but rather because the quoted phrase is "sufficiently broad that [the Court] cannot conclude that the [A.D.E.A.] plainly covers appointed state judges." *Id.* at 467. In other words, the Court was unwilling to interpret the A.D.E.A. to cover appointed state judges unless Congress made it explicitly clear that judges are included. *Id.*

[193] *See* Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997) ("The Court in *Gregory* refused to construe a congressional act to reach state governmental functions in the absence of a clear statement from Congress that it intended to do so").

[194] Gregory, 501 U.S. at 457-60.

[195] *Id.* at 459.

[196] *Id.* at 460.

[197] *Id.*, *citing* Taylor v. Beckham, 178 U.S. 548, 570-71 (1900).

[198] *Id.*

[199] Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).

[200] Gregory, 501 U.S. at 462.

Although the plain statement rule of federal preemption had been adjudicated many times in the past,[201] (and many times since *Gregory*),[202] the decision affirmed the role which federalism plays in determining the extent of federal supremacy. Because federalism requires Congress to be explicitly clear in its intent to preempt areas of law traditionally under state control, the protection of state powers from federal intrusion is subject to the political process. Without limiting Congressional jurisdiction, the Court provided teeth

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[201] *See, e.g.*, Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984); United States v. Bass, 404 U.S. 336, 349 (1971); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[202] *See* Cipplone v. Liggett Group, Inc., 505 U.S. 504 (1992) (concerning whether state tort and contract claims for personal damages resulting from a person's smoking-related injuries and death were preempted by the Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969. Liggett Group, Inc. argued that the petitioner's state claims were preempted by federal statutes which required manufacturers to post health warnings on each cigarette package sold. *Id.* at 509-10, the statutes also contained preemption clauses with the general intent of prohibiting states from imposing further requirements concerning cigarette advertising on manufacturers. The Court held that two of the six state law claims were preempted. It presumed that "the historic police powers of the States [are] not to be superseded unless that [is] the clear and manifest purpose of Congress." *Id.* at 516, *quoting* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995) (concerning the effectiveness of the state law imposition of a surcharge on employee benefit plans under the Employment Retirement Income Security Act of 1974 (ERISA) in light of ERISA's provision that it "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan." In reversing the lower courts, the Supreme Court took an anti-preemption stance. It stated:

> [D]espite the variety of . . . opportunities [to assert] federal preeminence, we have never assumed lightly that Congress has derogated state regulation. . . . Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation [citations omitted] . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress [citations omitted].'

Id. at 654-55. To stretch the "relate to" language of ERISA's preemption clause to its furthest point would seriously conflict with the Court's presumption against federal preemption.) *Id.* at 655; Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240 (1996) (concerning whether the Medical Device Amendments of 1976 (MDA), which provided for pre-market approval of medical devices by the Food and Drug Administration, precluded product liability claims under state common law for damages resulting from defective medical products. The Court held that state product liability claims may be brought despite the general proscription of the MDA. It paid high esteem to the states' exercise of their police powers:

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because 'these are primarily, and historically, . . . mattter[s] of local concern' [citations omitted], the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons' [citations omitted].

Id. at 2245.

to the principle of federalism by conditioning the exercise of federal power in contravention to traditional state concerns upon the political process through which federal legislation is passed. If traditional state powers were going to be preempted, it must be the result of the legislative process which effectively surrendered the power. As a corollary to the preemption requirement under the plain statement rule, the powers of states to legislate in areas fundamentally related to their sovereignty without Congressional interference are preserved.

The Court's subsequent decision in *New York v. United States*[203] again relied on the principle of federalism, this time in the public health context of a federal environmental clean-up program. Whereas *Gregory* concerned the authority of Congress to subject states to federal law, *New York* concerned the circumstances in which Congress may use the states as "implements of regulation."[204] Petitioners, New York state and two of its counties, challenged several provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the Act),[205] including so-called "incentives" for state compliance known as the "take title" provisions. These provisions required states which failed to timely provide for the disposal of radioactive wastes within their borders to take title to and possession of the wastes upon the request of the waste's generator or owner. A state's failure to take title and possession of such wastes would subject it to the liability of the waste generator or owner for all damages suffered therein.[206] Petitioners did not dispute that Congress had the power to legislate in the field of radioactive waste disposal. Instead, they contended that the chosen method of federal regulation violated the Tenth Amendment by directing the states as to how they, as sovereign governments, should legislate in the field.[207]

Justice O' Connor for the majority examined the authority of Congress under the Constitution in two ways:

> In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution [citations omitted]. In other cases the Court has sought to determine whether an Act of Congress invades the province

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[203]505 U.S. 144 (1992).

[204]*Id.* at 153.

[205]Pub. L. No. 96-573, 1980 U.S.C.A.N. (94 Stat.) 3347. The Act set forth several federal incentives to states in an attempt to require them to provide for the proper disposal of radioactive wastes generated in their borders. Among these incentives were various monetary rewards to states which achieved a series of waste site developments. Restricted access provisions would eventually allow states in compliance with the Act to turn away radioactive wastes from non-complying states. New York, 550 U.S. at 152.

[206]*Id.* at 153.

[207]*Id.* at 159-60. This distinction is an important one to the outcome of the case, for the Court believed that Congress could have simply preempted the field of radioactive waste disposal under the Supremacy Clause to avoid a Tenth Amendment challenge by the states. *Id.* at 160.

> of state sovereignty reserved by the Tenth Amendment [citations omitted].[208]

"[I]n a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other."[209] If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress [citations omitted].[210] Thus, whatever powers have not been conferred upon the federal government are held by the states.[211] While the extent of federal powers is subject to expansion under the broad nature of constitutional language,[212] the subsequent expansion of federal enumerated powers over decades does not uproot the federalist structure underlying the division of authority.[213]

In striking down the "take title" provisions of the Act,[214] the Court relied on the legal principle of *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*[215] that Congress may not "commandee[r] the legislative processes of States

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[208] *Id.* at 155.

[209] *Id.* at 156. *But see* Martin H. Redish, *Doing It with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L. Q. 593, 594 (1994) (Justice O'Connor's premise is "totally false; significant practical consequences flow from a reviewing court's choices between these two interpretive methodologies").

[210] New York, 505 U.S. at 156. Query as to whether Justice O'Connor is effectively arguing that the Tenth Amendment operates as a sort of reverse supremacy clause, protecting state powers from intrusion the same as federal powers. Regardless of the debate, the court has not recently equated the Tenth Amendment as providing states an aura of supremacy.

[211] *Id.* at 156-57.

[212] *Id.* at 157.

[213] *Id.* at 159 ("The actual scope of the Federal Government's authority with respect to the States has changed over the years, . . . but the constitutional structure underlying and limiting that authority has not").

[214] The Court found no constitutional problem with the first or second set of incentives discussed. *Id.* at 145. Both of these incentives were supported by affirmative grants of the Spending and Commerce Clause powers to Congress and thus were consistent with the Tenth Amendment. *Id.* at 169-74. However, the third set of alleged incentives, which would require non-complying states to take title and possession of in-state radioactive wastes (or suffer the liability resulting therefrom), were found to be beyond the authority of Congress. *Id.* at 175-77. This third provision gave states two choices: (1) legislate in the manner in which the federal government has demanded; or (2) be held liable to the citizens of your state who are responsible for the resulting damages. Neither choice is constitutional since either alternative presented to the states would effectively "'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *Id.* at 2428.

[215] 452 U.S. 264 (1981).

by directly compelling them to enact and enforce a federal regulatory program."[216] The Constitution does not allow Congress to instruct states how to legislate,[217] since its authority is based on the power to regulate individuals, not states. Congress can encourage state regulation or offer incentives to influence the policy choices made by states. "[It] may attach conditions on the receipt of federal funds,"[218] under the Spending Power provided the conditions bear some relationship to the purpose of federal spending. As well, it can offer states a choice pursuant to the Commerce Clause between regulating activity according to federal standards, or having state law preempted by federal regulation,[219] in the spirit of "cooperative federalism."[220] But Congress cannot mandate state regulation: "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[221] Under proper exercises of the Spending Power or Commerce Clause, states retain the power to comply or not comply with the federal agenda depending on their individual citizens' and government's particular desires.[222]

The Court's holding is particularly compelling in the field of public health law because of instances, like the gradual disposal of radioactive waste, in which a uniform response can be critical to the containment of a national public health problem. In a public health system driven by national objectives, Congressional legislation compelling state regulation and enforcement may be the most expeditious manner of accomplishing such uniformity. Yet, *New York* means at the very least that national legislation compelling state action in a field of traditional state concern, including public health, is constitutionally suspect under the Tenth Amendment. Congress must legislate carefully to avoid the appearance of requiring states to legislate or regulate for their own good. As in *Gregory*, such legislative requirements, regardless of the accomplishment of legitimate ends, are an inherent part of the political process in a federalist system.

216*Id.* at 288.

217New York, 505 U.S. at 162.

218*Id.* at 167, *citing* South Dakota v. Dole, 483 U.S. 203, 206 (1987).

219*Id. citing* Hodel v. Virginia Surface Mining & Reclamation Association., Inc., 452 U.S. 264, 288 (1981); FERC v. Mississippi, 456 U.S. 742, 764-65 (1982).

220New York, 505 U.S. at 167, *citing* Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 289 (1981).

221*Id.* at 188.

222*Id.* at 178-80 ("while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so"). *Id.* at 145. *See also* Jesse H. Choper, *Commentary: Federalism and Judicial Update*, 21 HASTINGS CONST. L.Q. 577, 583-84 (1994), for further discussion of the Court's holding in New York.

Justice O'Connor further elaborated on this point in *New York*.[223] Where Congress attempts to compel state compliance with federal objectives, the damage inflicted upon state sovereignty is reflected in the diminished voter accountability at both levels of government. If, for example, a state's citizenry believes it to be in the interests of the state to avoid federal compliance in a given field, it may elect state representatives that will act upon their beliefs by rejecting such compliance. In such case, Congress may choose to preempt state regulation in the field whereby members of Congress from said state will suffer the consequences should preemption prove unwise. However, where the federal government directs states to legislate in an unwise manner, it is the state representatives who will directly face the political consequences of their actions, not the members of Congress per se. As Justice O' Connor summarizes, "[a]ccountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre- empted by federal regulation."[224] The role of individual voters, for which the government owes its existence, is thwarted and diminished. This result is an abuse of government which federalism was designed to avoid by requiring mandatory legislative safeguards inherent in the political process against federal intrusions upon the states' traditional powers.

In *United States v. Lopez*,[225] the Supreme Court applied its reaffirmed appreciation of federalism in another a field of national public health concern, gun control among minors.[226] *Lopez* involved a challenge to a provision of the Gun-Free School Zones Act of 1990 (Gun- Free Act) which made it a federal criminal offense for "any individual knowingly to possess a firearm at any place

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[223] *See also* United States v. Lopez, 514 U.S. 549 (1995) (Kennedy, J., concurring). Justice Kennedy, in a thoughtful Concurring Opinion joined by Justice O' Connor, provided insight to Justice O' Connor's theory of political accountability as an underpinning of federalism. Acclaiming federalism as the "unique contribution of the Framers to political science and political theory," *id.* at 575, Justice Kennedy acknowledged the double security of the rights of the people inherent in a governmental system where different governments control each other as well as themselves. Of course, the people control both governments. The ultimate benefit to the citizenry of federalism is the enhanced liberty accorded in two governments versus one. From this structure arises "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *Id.* at 576. To allow one government to overtake the other would blur "the boundaries between the spheres of federal and state authority." "[P]olitical responsibility would become illusory." *Id.*

[224] New York, 505 U.S. at 169.

[225] Lopez, 514 U.S. 549.

[226] *See* TOM CHRISTOFFEL & STEPHEN P. TERET, PROTECTING THE PUBLIC: LEGAL ISSUES IN INJURY PREVENTION 202-09 (1993) ("Firearm injuries have been a particular problem in the United States for centuries, so laws to control firearms are not new. . . . Gun control has traditionally been a state and local concern. . ."). However, the Court in Lopez analyzed Congress' jurisdiction to enact the Gun-Free School Zones Act exclusively under the assumption that the Gun-Free Act was a criminal law (which, like public health, is a matter primarily under the jurisdiction of states pursuant to their police powers). Lopez, 541 U.S. at 561 n. 3.

[the individual] knows . . . is a school zone."[227] Congress relied upon its commerce power in legislating the offense. Alfonso Lopez, Jr., a minor at a San Antonio, Texas public high school, was charged with violating the Gun-Free Act after he admitted to carrying a .38 caliber handgun and five bullets to school on the day he was arrested.[228] Lopez moved to dismiss the federal indictment on the ground that the underlying offense represented an unconstitutional attempt by Congress to legislate control over state public schools.[229] The federal district court rejected Lopez's motion and tried him on the offense as charged, finding him guilty.[230] On appeal, the Fifth Circuit Court of Appeals reversed Lopez's conviction, holding that the section under which he was charged was invalid for lack of federal jurisdiction under the Commerce Clause.[231] The Supreme Court affirmed the decision of the Court of Appeals.[232]

Chief Justice Rehnquist, writing for the majority, delved into the history of the power of Congress to legislate pursuant to the Commerce Clause.[233] The Court identified three broad categories of activity that Congress can lawfully regulate under its modern commerce power. Congress may regulate: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce;[234] and (3) those activities having a substantial relationship to interstate commerce. Under the final prong, legislation regulating any economic activity which substantially affects interstate commerce is generally upheld.[235] Since the first two prongs of Commerce Clause jurisdiction were inapplicable, the challenged provision of the Gun-Free Act must have been lawfully passed pursuant to the third prong of Commerce power. In other words, the federal criminalization of the mere possession of a firearm in a school zone must economically, or otherwise, substantially affect interstate commerce.

In defense of the Act, the Government presented two theories supporting the exercise of the commerce power based on twisted, broad interpretations of

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[227] 18 U.S.C. § 922(q)(1)(a) (1996).

[228] Lopez was originally charged with a violation of a Texas state law, Tex. Penal Code Ann. § 46.03(a)(1) (West 1994), prohibiting similar conduct. The state charges were dropped when federal authorities charged the minor under the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp V). Lopez, 115 S. Ct. at 1626.

[229] Lopez, 514 U.S. at 551.

[230] *Id.*

[231] Lopez v. United States, 2 F.3d 1342, 1367-68 (5th Cir. 1993).

[232] Lopez, 514 U.S. at 551.

[233] *Id.* at 551-59.

[234] Even though a threat thereto may derive solely from *intrastate* activities. *Id.* at 557-58.

[235] *Id.* at 509.

what is substantially related to interstate commerce in an economic sense.[236] The Court was unswayed by either theory:

> "[I]f we were to accept the Government's arguments, we are hard-pressed to posit any activity . . . that Congress is without power to regulate.[237] Such a finding would be inconsistent with the general framework of government. Clearly the Constitution withholds from Congress "a plenary police power that would authorize enactment of every type of legislation."[238]
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> In striking down the provision of the Gun-Free Act the Court concluded: "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . This we are unwilling to do."[239]

The denial of national police powers to Congress under the commerce power was the boldest move by the Court to date in reaffirming the principle of federalism. The importance of the Court's decision in *Lopez* must be emphasized. "[*Lopez*] was the first decision in some five decades to define any limit to the meaning of the phrase "commerce among the states,"[240] in light of the Court's unsuccessful attempt to do so in *National League*.[241] The Court's decision in *Lopez* was particularly compelling because fifty-four years earlier

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[236]Lacking a strong jurisdictional statement in support of the Gun-Free Act, the United States presented its own theories purporting the substantial affect the mere possession of a firearm has on interstate commerce. The first of these theories, labeled by the Court as the "costs of crime reasoning," centered on the correlation between firearm possession and violent crime, and the resulting affect the latter had on the national economy. The second theory, the so-called "national productivity reasoning," focused on the substantial threat to the educational process posed by the presence of guns in schools. The result of a threatened educational system, it was argued, is a less productive citizenry which in turn has an adverse effect on the economic well-being of the Nation. *Id.* at 564.

[237]Lopez, 514 U.S. at 564.

[238]*Id.* at 566, *see* U.S. CONST. art I, § 8.

[239]*Id.* at 567. Justice Thomas in his Concurring Opinion advocated a reformulation of the "substantial relationship" prong of the Commerce Clause to prevent the Congress from having "a police power over all aspects of American life." *Id.* at 584 (Thomas, J., concurring). Although failing to present a reformulated test for future use, Justice Thomas noted that the extension of the Commerce power to all matters substantially related to interstate commerce has extended the federal government into areas unknown to the constitutional Framers. *Id.* at 590-91 (Thomas, J., concurring). The Commerce power as it exists under its present formulation gives Congress "a blank check." *Id.* at 602 (Thomas, J., concurring).

[240]Robert F. Nagel, *The Future of Federalism*, 46 CASE W. L. REV. 643, 644 (1996).

[241]426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

in *United States v. Darby*[242] it effectively gave Congress national police powers under the Commerce Clause. The power Congress used so extensively during the New Deal to expand the federal presence was limited in favor of the states powers in the context of an important public health objective of stemming the national crisis of death and injury resulting from handgun use.

More recently, in *Printz v. United States*,[243] the Court examined a further exercise of federal power promoting gun control policies. The issue in *Printz* was whether an unfunded provision of the Brady Bill requiring local law officials to investigate the backgrounds of handgun purchasers violates state sovereignty principles under the *New York* theory that the federal government is commandeering states to enforce federal objectives.[244] Rejecting Congress' attempt to require unfunded state assistance to enforce the Brady Bill, the Court's decision in *Printz*, like its decision in *Lopez*, curbs the national effort to control handgun violence through national legislation.[245] In addition, *Printz* implicates the cooperative nature of federal and state efforts in other public health contexts by allowing states to effectively refuse to participate in federally-mandated reporting, enforcement, and administrative requirements.

Two additional decisions of the Supreme Court in the past two years have sustained the federalism trend. In *U.S. Term Limits, Inc. v. Thornton*,[246] the Court reviewed the federalism question not from the side of federal control over states, but from the attempted control by a state over an exclusively federal matter. The State of Arkansas argued that the Tenth Amendment empowers a state to impose term limits on its own federal representative offices.[247] Since the Constitution contains no express provision prohibiting further qualifications at the state level, Arkansas concluded that states must have been reserved the power to do so via the Tenth Amendment.[248] Justice Stevens,

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[242] United States v. Darby, 312 U.S. 100 (1941). *See also, supra*, Part IV. B.

[243] 514 U.S. 774 (1997).

[244] *See* Linda Greenhouse, *Justices Will Handle Dispute Over Investigating Gun Buyers*, N.Y. TIMES, June 18, 1996, at A20; Joan Biskupic, *Justices Joust Over States' Rights*, WASH. POST, Dec. 4, 1996, at A20.

[245] *Cf.* Joan Biskupic, *Courts Voids Background Check of Gun Buyer Under Brady Law*, WASH. POST, June 28, 1997, at A1 ("The decision is likely to have limited impact on gun control: most states already require background checks and the federal government is developing a nationwide screening system to do the work that currently is left to local law enforcement.").

[246] 514 U.S. 774 (1995).

[247] *Id.* at 852. The voters of the State of Arkansas adopted Amendment 73 to their state constitution which was in part intended to impose term limits on candidates for federal seats in both Houses of Congress. A challenge among opposing voters in the state questioned the constitutionality of a state law that attempted to alter the terms of qualification for federal office as set forth in Article I of the United States Constitution. *Id.* at 784-85.

[248] *Id.* at 799-800. The question whether the federal Congress could alter the constitutional qualifications for its offices had already been answered by the Court in

writing for the Court, disagreed. Although the states "unquestionably do retain a significant measure of sovereign authority,"[249] the power to add qualifications to federal offices is not a part of their powers.[250] The Tenth Amendment reserves those powers which existed before the creation of the nation. Only through the formation of the Union did states acquire any rights in the incidents of the federal system. As a result, the Court concluded, the reserved power attributable to the states simply does not include the power to alter those matters which it ceded to the Union.[251]

In essence, *Thornton* simply reaffirms one of the original parameters of federalism which the Framers intended, that is, the sovereign powers of states cannot be used to alter federal constitutional law because federal law is supreme. The case serves as a timely reminder to states, however, of the limits of federalism jurisprudence. The modern issue of federalism as seen in *Gregory v. Ashcroft*, *New York v. United States*, and *United States v. Lopez* was the degree to which federal powers could intrude on state sovereignty. Determinations of the supremacy of federal powers by states was not about to become part of the debate: federal powers have remained absolute from state intrusions since *McCulloch v. Maryland*.[252] And yet, the supremacy of federal law was once again

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Powell v. McCormack, 395 U.S. 486 (1969): clearly, it could not. Thornton, 514 U.S. at 793-98. "[W]e reaffirm that the qualifications for service in Congress set forth in the text of the Constitution are 'fixed,' at least in the sense that they may not be supplemented by Congress." *Id.* at 798.

[249] *Id.* at 801, *citing* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549 (1985).

[250] Thornton, 514 U.S. at 854.

[251] *Id.* at 806-08. Tying into the theory of national government as a government for the people, Justice Stevens confirmed the Court's decision as one consistent with democratic principles: "Our conclusion that States lack the power to impose qualifications vindicates the same 'fundamental principle of our representative democracy' that we recognized in *Powell*, namely that 'the people should choose whom they please to govern them.'" *Id.* at 819, *citing* Powell v. McCormack, 395 U.S. 486, 547 (1969).

Justice Thomas in dissent argued that where the Constitution is silent on the question of additional qualifications for federal offices, it impliedly allows the exercise of further power by the states. Thornton, 514 U.S. at 845 (Thomas, J., dissenting). States can exercise all the powers which the Constitution does not withhold from them. *Id.* at 848. "The Constitution derives its authority . . . from the consent of *the people* of the States," *Id.* at 851 (italics original), not from the consent of state governments. That the Tenth Amendment reserves those powers not delegated to the federal government "to the states respectively, or to the people," U.S. Const. Amend X means that the people, and not solely the government, can decide the extent of those powers. Thornton, 514 U.S. at 851-52. (Thomas, J., dissenting). Thus, as Justice Thomas concluded, since neither the Qualifications Clause of Article I nor any other provision of the Constitution prohibits the determination of further qualifications for office, the Tenth Amendment must have reserved this power to the states or their people. *Id.* at 852.

[252] 17 U.S. (4 Wheat.) 316 (1819) (which invalidated the attempt by Maryland to tax the issuance of bank notes by the newly created national bank).

the center of debate in the Court's recent federalism-based decision, *Seminole Tribe of Florida v. Florida*.[253]

Seminole involved the State of Florida's Eleventh Amendment[254] challenge to various provisions of the Indian Gambling Regulatory Act,[255] passed by Congress under authority of the Indian Commerce Clause,[256] which allowed Indian tribes to sue states in federal court. The Eleventh Amendment supports two precepts of federalism: (1) that each state is a sovereign entity in our federal system; and (2) that, inherent in the nature of sovereignty, each state is immune to suit without the sovereign's consent.[257] In order to abrogate state sovereign immunity Congress must evidence the unequivocal intent to do so pursuant to a valid exercise of Congressional power.[258] The Court had previously allowed Congress to abrogate state sovereign immunity only under the Fourteenth Amendment[259] or the Interstate Commerce Clause.[260] Petitioner, the Seminole Indian Tribe, asked the Court to extend Congress' abrogation authority to exercises of Congress' power under the Indian Commerce Clause.[261] Instead, the Court withdrew its approval of the extension of Congressional abrogation of state sovereignty under the Interstate Commerce

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[253]517 U.S. 44 (1996).

[254]U.S. Const. Amend. XI states as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against [any] one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[255]25 U.S.C. § 2710(d) *et seq.* (1996). The Act's provisions allow an Indian tribe to engage in gaming activities on its reservation, but only pursuant to a valid compact between the tribe and its host state. A duty is imposed upon the states to negotiate in good faith with Indian tribes toward the formation of a valid compact. If a state fails to negotiate in good faith for this purpose, the Act authorizes an Indian tribe to compel such negotiations by filing suit in federal court. When the state of Florida was sued by the Seminole tribe under the authority of the Act, it motioned to dismiss the suit on the basis that it violated the state's sovereign immunity in federal court, as provided by the Eleventh Amendment. Seminole Tribe, 517 U.S. at 48.

[256]U.S. CONST. art. I, § 8, cl. 3.

[257]Seminole Tribe, 517 U.S. at 53, *but see id.* at 1147 (Souter, J., dissenting) ("[T]he legislative history of the Constitution hardly warrants the conclusion drawn by some that there was a general understanding, at the time of ratification, that the states would retain their sovereign immunity") (citations omitted).

[258]Seminole Tribe, 517 U.S. at 55, *citing* Green v. Mansour, 474 U.S. 64, 68 (1985). The Court acknowledged that Congress had stated unequivocally its intention to abrogate state sovereign immunity under the Indian Gambling Regulatory Act. *Id.* at 56-57. The remaining question was whether Congress had acted pursuant to a valid exercise of the commerce power. *Id.* at 58.

[259]*See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[260]*See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

[261]Seminole Tribe, 517 U.S. at 60.

power (and the similar Indian Commerce Clause).[262] In so doing, it clarified what it viewed as the strength of the Eleventh Amendment:[263] "Even when the Constitution vests in Congress complete lawmaking authority over a particular area [as with the Indian Commerce Clause], the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[264]

In a broad sense, *Seminole* demonstrates that federal governmental powers cannot be exercised in contravention of federal constitutional law because federal constitutional law is supreme.[265] In this sense, *Seminole* simply reaffirms the flip-side of the same federalism principle of *Thornton*.[266] Together, the two decisions exhibit the Court's intolerance of governmental exercises of power at the state or federal level which impede on the constitutional guarantees of power and immunity allotted to each level. In such, they evince the fundamental division of state and federal power in a federalist system of government.

B. New Federalism and National Public Health Objectives

New federalism cases have resulted in the Rehnquist Court's adoption of a super-strong rule against federal invasion of "core state functions,"[267] a presumption against application of federal statutes to state and local political

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[262]The sole case upholding Congress' abrogation rights under the Commerce power, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), was overturned. Seminole Tribe, 517 U.S. at 66.

[263]As Professor Carlos Manuel Vazquez of Georgetown University Law Center argues, the Court's decision in *Seminole* presents a fundamental restructuring of Eleventh Amendment jurisprudence. Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity? Seminole v. McKesson*, 106 YALE L. J. 1687 (1997). His analysis demonstrates that the Court has shifted its conception of the Eleventh Amendment immunity of states. Where the Court previously held the Eleventh Amendment sheltered states from suit in federal court, *Seminole* reflects the Court's willingness to extend the state's immunity not simply to suit, but to the liability upon which such suits are based. In this sense, the Court has not only deepened the state's Eleventh Amendment immunity by "placing it beyond Congress' power to abrogate under Article I, [it] may also have broadened it by recasting it as an immunity from certain forms of liability rather than just an immunity from federal jurisdiction."

[264]Seminole Tribe, 517 U.S. at 72.

[265]There are limits to congressional authority. Congress may not (1) create statutory rights prohibited by the Constitution; (2) remove rights guaranteed by the Constitution; or (3) create a right which is inconsistent with a constitutional objective. *See* Flores v. City of Boerne, 73 F.3d 1352, 1356 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997).

[266]Thornton reaffirms the federalism principle that the sovereign powers of states cannot be used to alter federal constitutional law because federal law is supreme.

[267]*See* BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994); Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 251 (1994); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 515-16 (1992); California v. ARC America Corp., 490 U.S. 93 (1989).

processes,[268] and a disdain for federal action that "commandeers" state governments into the service of federal regulatory purposes.[269] The Commerce powers, which had expanded so greatly during the New Deal, were reigned in to a degree by the Court's decisions in *United States v. Lopez*[270] and *Seminole Tribe of Florida v. Florida*.[271] *Lopez* stripped Congress of national police powers and *Seminole* limited Congress' ability to subject states to suit in federal court under the Interstate Commerce Clause. These cases collectively support over time the reality of federalism as a powerful, substantive tool of constitutional debate.[272] Their strength lies in their diversity: virtually any case where federal and state interests collide presents an opportunity for federalism-based arguments.

Some argue that recent federalism jurisprudence represents the Court's attempt to restructure American government.[273] It is contended that federalism and its accompanying emphasis on states' rights represent a politically-acceptable means to justify the decentralization of governmental power.[274] While "[r]estoring true federalism [would] require the 'most fundamental restructuring of state and federal relations since the New Deal,'"[275] such is not the Court's intent. It has not come close to restructuring government in the United States, nor does it plan to.[276] While the principle of federalism gives the Court freedom to paint with a broad brush, its decisions exhibit narrow, accurate strokes.

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[268] *See* City of Columbia v. Omni Outdoor Adver Inc., 499 U.S. 365, 373 (1991).

[269] *See* New York v. United States, 505 U.S. 144 (1992).

[270] 514 U.S. 549 (1995).

[271] 517 U.S. 44 (1996).

[272] "There is no going back of federalism," said Professor Susan Low Bloch of Georgetown University Law Center. "This is something Rehnquist and O'Connor have been working toward for years and now that they have the votes they are not likely to stop" in their federalism jurisprudence. Joan Biskupic, *Vexing Social Issues Portend A Stirring Term for Supreme Court*, WASH. POST, October 6, 1996, at A6.

[273] *See* discussion accompanying the text in Part I, Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643-44 (1996).

[274] Justice O'Connor acknowledges the maintenance of a decentralized government as one of the advantages of the federalist structure. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[275] Richard C. Reuben, *The New Federalism*, A.B.A. J., Apr. 1995, at 77, *quoting in part* Clint Bolick, a civil rights activist with the conservative Institute for Justice in Washington, D.C.

[276] *See* Nagel, *supra* note 273, at 655 ("It seems doubtful . . . that a majority of the Justices favor significant decentralization. . . . the record as a whole is mixed enough to cast doubt on the idea that devotion to decentralized decision-making is now an overriding value for most members of the Court. *Id.* at 658).

New federalism represents the Court's subtle method of returning legitimacy to state sovereignty.[277] The principle means through which this is accomplished by the Court in its calculated fashion is to constrain Congressional legislative power to the political process.[278] For example, in *Gregory v. Ashcroft*[279] and subsequent preemption decisions,[280] the Court acknowledged that Congress had the power to override traditional state law in the pursuit of federal interests through strong preemption language. Its refusal to hold that state law was preempted under the plain statement rule evidences the Court's recognition of the political difficulty in negotiating forceful preemption language, and thus the likelihood that state law would remain intact. Thus, the Court, completely aware of the federalism protections built into the political process, seeks only to ensure the viability of these protections through its *new federalism* jurisprudence.[281]

The context of new federalism in the field of public health law is fleshed out in the history of public health regulation. New federalism as a constitutional and political principle is geared toward the protection of traditional functions of states under their police powers. As shown in Part III of this Article, the regulation of public health has traditionally been a state function. The metamorphosis of public health regulation from a purely local to predominantly national concern resulted from the increased federal presence in the field in light of a deemphasis of the principles of federalism, as demonstrated in Part IV. It is an inescapable conclusion that increased federal regulation in the interests of public health has intruded upon the exercise of state police powers toward these same interests. National public health priorities often predominate over local public health goals. To protect traditional exercises of state police powers, new federalism restrains the intrusion on these powers by the federal government by requiring Congress to operate within the political process. As a result, the exercise of the police powers of states in the interest of public health is strengthened where the political process confines federal authority to further enter the field, and sometimes requires its retreat.

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277 *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971) ("What the concept [of federalism] . . . represent[s] is a system in which there is sensitivity to the *legitimate* interests of both State and National Governments . . .") (emphasis added).

278 The federalism movement of the Supreme Court has not fallen on deaf ears in Congress. In fact, the prevailing pattern of federalism decisions "appear[s] to be in tune with the prevailing political winds." Nagel, *supra*, note 273, at 645.

279 501 U.S. at 460.

280 *See* Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240 (1996); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995); Cipplone v. Liggett Group, Inc., 505 U.S. 504 (1992).

281 *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 63, (1996) ("Our willingness to reconsider our earlier decisions has been 'particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible'" (citations omitted)).

These points are illustrated in *Acorn v. Edwards*,[282] where the Court of Appeals for the Fifth Circuit in 1996 struck down a provision of the Lead Contamination Control Act (LCCA) requiring states to establish remedial action programs for the removal of lead contaminants from school and day-care water fountains. The LCCA was enacted by Congress in 1988 in response to the national public health concern that children were exposed to unsafe amounts of lead in their drinking water.[283] The Environmental Protection Agency was primarily charged with the administration of the Act. States were only required to implement the Agency's recommendations as to lead-safe water fountains and "establish a program . . . to assist local educational agencies in . . . remedying lead contamination at schools."[284] When the State of Louisiana failed to timely comply with the Act, a local public interest group sued the state Governor and Department of Health and Hospitals under a citizen's suit provision of the Safe Drinking Water Act (which the LCCA amended). The State claimed the LCCA's provisions were unconstitutional under the Tenth Amendment on the theory of *New York*[285] that they compelled state compliance with a federal regulatory program.

The Fifth Circuit agreed, at least concerning the LCCA's requirement that states come up with remedial programs. The requirement that states develop a program to further the federal government's purposes, or be subject to civil suit, "is no choice at all."[286] It represents "an attempt by Congress to force States to regulate according to Congressional direction. As the *New York* Court explained, the Constitution does not permit Congress to so control the States' legislative processes."[287] In this sense, the LCCA works an unconstitutional intrusion upon a state's "sovereign prerogative to legislate as it sees fit."[288] Despite the worthy, public health objective of the LCCA, the court in *Acorn* was compelled by the principle of federalism to strike down the particular manner in which Congress chose to legislate, thus returning to the state more control over the issue.

Does new federalism tell us as a society that we are wrong to prioritize public health duties in terms of national goals?[289] Clearly, no. There are concrete

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[282] 81 F.3d 1387 (5th Cir. 1996); *cert. denied*, 117 S. Ct. 2532 (1997).

[283] *Id.* at 1388.

[284] 42 U.S.C. § 300j-24(d) (1996).

[285] *Acorn*, 81 F.3d at 1390.

[286] *Id.* at 1394.

[287] *Id.*

[288] *Id.*

[289] Although the Institute of Medicine's assessment of the existing nationalized structure in 1988 certainly raises questions as to the overall effectiveness of the public health system. Institute of Medicine, The Future of Public Health Law 19-34 (1988); *see also* Stanley J. Reiser, *Commentary: Medicine and Public Health*, 276 JAMA 1429 (November 6, 1996) ("By the 1990's . . . the United States continued to top all other nations in health care spending but got unacceptably poor returns measured by patterns of health and

reasons for the shift of public health from local to national proportions, including the containment of public health concerns which can only be accomplished in light of national policy. New federalism does not require the disassembling of national public health goals in order to return all public health powers to the sovereign governments which originally held them. Rather, new federalism requires us to develop appropriate public health law strategies which accomplish national objectives without infringing state sovereignty. Even the most important public health objectives from a national perspective cannot likely be accomplished through federal legislation mandating state compliance or subjecting states to judicial remedies in their failure to meet national standards. Not only are federal courts empowered to strike such legislation down, the federal political process is not likely to pass such legislation without compromises.

While new federalism in the field of public health law suggests that public health objectives are most directly accomplished at the state level, this conclusion is not necessarily detrimental. The reality of the federal political process is that federal legislation and regulation invariably represents a mediocre compromise to the accomplishment of specific goals. In an overly-centralized government, national public health objectives may remain unfulfilled in light of watered-down legislation enforced by bureaucratic, non-accountable federal agencies. While the state legislative process involves compromises like those seen in the federal Congress, state governments are generally more responsive to the needs of their citizenry.[290] Besides, state police powers allow state legislatures to remedy public health dilemmas in multi-various ways. Since public health needs may differ from state to state for which each state must be able to respond to directly, nationalizing public health priorities to the exclusion of states would be disastrous. States serve a vital function as laboratories of legislative ingenuity in meeting the disparate public health needs across the nation.[291]

Of those public health objectives which require national implementation, new federalism suggests the surest manner to accomplish such objectives is to persuade rather than compel states to comply. National legislation which proposes legitimate incentives to states, such as federal funds or national expertise, in return for their cooperation, comports with a federalist system of government. It gives states a choice whether to surrender part of their police powers for the benefits of federal assistance. As well, national public health objectives may be accomplished through states directly by encouraging them

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illness in its population").

[290]One of the incidences of federalism is the allowance for more innovation and experimentation in state government. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[291]*See* United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (the States serve a valuable role "as laboratories for experimentation to devise various solutions where the best solution is far from clear") *citing* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 49-50 (1973); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

to enact uniform legislation at their own level. While this route is disadvantaged by the potential for differences in state enforcement and timing of legislative enactments, federalism concerns are minimized.

VI. CONCLUSION

The importance of federalism to the field of public health law is evident from the historic view of the concept as it relates to state police powers and public health objectives. Federalism was originally designed to prevent mutual intrusions of federal and state powers. State police powers were traditionally viewed as the sole source of legal authority for the government to act in the interests of the public health. Public health goals were conceptualized in relation to exercises of these police powers and thus were limited to local state concerns. Only through the expansion of federal powers and the deemphasis of federalism during the New Deal did the federal government come to play a significant role in public health law. As a result, public health goals were broadened to accomplish national objectives.

The recent emergence of federalism principles preserving states' rights and powers suggests that Congress must legislate carefully if it wishes to accomplish public health objectives. Ultimately, new federalism suggests the return to the utilization of police powers of the states to meet public health goals which federal legislation cannot. New federalism does not require the abandonment of national public health objectives. It simply requires that these objectives be accomplished in consideration of the political system in which all governmental power is distributed. Thus, federalism does not represent a threat to the national conception of public health. Rather, it presents a challenge to develop and utilize new legal strategies to fulfill the public health needs of citizens of a Union of sovereign states.